TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
PETITIONER,

vs.

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
OWNER OF SS. KOTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 20, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S KOTOR, Libelant,

versus

GEORGIA HARDWOOD LUMBER COMPANY, Respondent

In Admiralty No. 4

DOCKET ENTRIES

May 10, 1941. Original Libel.
May 10, 1941. Monition returnable May 30, 1941.
May 14, 1941. Marshal's return showing personal service on Robert B. Pamplin, Sec.-Treas., on May 12, 1941.
May 28, 1941. Order of Bascom S. Deaver extending time for filing answer until June 15, 1941.
June 13, 1941. Answer of Respondent.
July 3, 1941. Exceptions of Libelant to answer of Defendant.
June 24, 1942. Hearing before Judge A. B. Lovett.
Dec. 7, 1942. Copy of transcript of testimony taken June 24, 1942, at Augusta, Ga.
Dec. 7, 1942. Notice of Libelant to Respondent.
Dec. 7, 1942. Admission of Facts by Respondent.
Dec. 7, 1942. Opinion of Judge Lovett finding in favor of Respondent, libel to be dismissed.
Apr. 20, 1943. Findings of Fact and Conclusions of Law.

[fol. 2]

Apr. 20, 1943. Final decree, dismissing libel and taxing costs, $111.00, with interest from date until paid and directing that execution issue unless satisfied or stayed by appeal within ten days.
July 12, 1943. Notice of Appeal—copies mailed to Hull, Barrett, Willingham & Towill and Carpenter & Stevenson, as required by rule 73b.
July 21, 1943. $250.00 bond for costs on appeal.

Docket Entries Continued

July 21, 1943. Assignment of errors with acknowledgment of service by Hull, Barrett, Willingham & Towill.

Aug. 14, 1943. Petition for appeal.

Aug. 14, 1943. Stipulation as to Exhibits.

Aug. 14, 1943. Praecipe.

Aug. 17, 1943. Citation dated Aug. 16, 1943, signed by Judge Lovett, with Acknowledgment of Service to be forwarded with transcript to Clerk, Court of Appeals.

Aug. 30, 1943. Order dated August 30, 1943 allowing appeal nunc protunc as of July 12, 1943.

In United States District Court

Libel

To the Honorable Judges of the United States District Court for the District of Georgia:

The Libel and Complaint of Compania De Navegacion Transmar, S. A. owner of the S/S Kotar, against Georgia-Hardwood Lumber Company, in a cause of contract, civil and maritime, respectfully shows on information and belief:

First: That at all of the times herein mentioned, the libelant was and now is a corporation duly organized and existing under and by virtue of the Laws of the Republic of Panama, with its principal office and place of business at Panama City, and the owner of the S/S Kotar.

[fol. 3] Second: That at all of the times herein mentioned, the respondent was and still is a corporation duly organized and existing under the Laws of the State of Georgia, with an office and place of business at Augusta, Georgia.

Third: That on or about November 13, 1940, libelant entered into a contract in writing, signed by Cavalier Shipping Company, Inc., brokers for the account of Georgia Hardwood Lumber Company, and accepted by Georgia Hardwood Lumber Company to make a shipment from Jacksonville, Florida, to Alexandria, Egypt, by the Steamer Kotar, scheduled to load November 25, 1940.

Fourth: The shipment was to consist of seven hundred fifty thousand board feet of pine timbers not exceeding

four (4) pounds per thousand (1,000) board feet on and/or under deck, ship's option.

A copy of the said contract is hereto annexed and made a part hereof.

Fifth: That thereafter the S/S Kotar arrived at Jacksonville and loaded the timbers provided by the shipper. When said timber was put on board, it was found that the ship went down to her marks before it was loaded its full cargo by reason of the fact that the lumber shipped by the respondent exceeded the maximum weight stipulated in the contract.

Sixth: By reason of the respondent's cargo exceeding the weight (maximum 1,500 short tons) provided in the contract by 531,656 pounds, the vessel lost freights on a corresponding amount of tonnage.

Seventh: That the freights lost to the libelant through reason of respondent's cargo exceeding their contract max-
[fol. 4] imum, amounted to Nine-Thousand Three Hundred Four and 00/100 Dollars ($9,304), no part of which has been paid although duly demanded.

Eighth: The libelant has duly performed all and singular the obligations resting on it under the above mentioned freight contract of November 13, 1940.

Ninth: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that citation in due form of Law may issue against the respondent therein, citing the respondent to appear and answer in the premises, and that a decree may be entered herein in favor of the libelant against the respondent for the amount of libelant's damages, together with interest and costs, and that the Court will grant to the libelant such other and further relief as the justice of the cause may require.

Dow, McAllister & Symmers, (Dow, McAllister & Symmers) Proctors for Libelant. Office & P. O. Address, 17 State Street, Borough of Manhattan, City of New York. Cumming, Harper & Nixon, Augusta, Georgia.

Duly sworn to by Wilbur E. Dow, Jr. Jurat omitted in printing.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

[fol. 6] To the Honorable the Judge of the District Court of the United States for said District and Division:

Georgia Hardwood Lumber Company, a corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business in the City of Augusta, Georgia, respondent herein to the libel of the above named libelant, makes this its answer to said libel and the several paragraphs thereof, and admits, denies and alleges as follows:

1. Respondent has no information or belief sufficient to enable it to answer the allegations of article one of the libel herein, and, therefore, calls for strict proof thereof, if relevant.

2. The allegations of the second article of said libel are admitted.

3. Respondent admits entering into a contract with libelant for the transportation of certain timber from Jacksonville, Florida, to Alexandria, Egypt, which contract was entered into on or about November 13, 1940, through Cavalier Shipping Company, Inc., brokers, who were at that time representing libelant in the operation of its steamer, Kotar, and that said contract was duly accepted by respondent and signed by libelant, and provided that shipment was to be made by the steamer, Kotar, scheduled to load said shipment on November 25, 1940. Except as specifically admitted, the third article of said libel is denied.

[fol. 7] 4. Respondent denies the allegations of the fourth article of said libel. Further answering said article, respondent admits that the contract referred to provided that the shipment was to consist of 750,000 board feet, of pine timber not exceeding 4 pounds per 1000 board feet on and/or under deck, ship's option, but respondent shows that the provision as to weight of 4 pounds per 1000 board feet was a typographical error, and the weight should have been 4 pounds per board foot or 4000 pounds per 1000 board feet. Further answering the fourth article of said libel, respond-

ent shows that the error so appearing in the contract covering said shipment is manifest on the face of said contract, and that at the time of signing said contract respondent called attention to said error and delivered said contract with a letter accompanying the same specifically providing that the weight referred to should be 4000 pounds per 1000 board feet, in correction of the manifest typographical error appearing in said contract. Further answering said article, respondent shows that said error was apparent on the face of the contract, was known to the libelant at the time the contract was accepted, and is now recognized in the libel which has been filed, through the statements contained in the sixth article thereof referring to the maximum weight as being 1500 short tons, which is the equivalent of 750,000 board feet of timber at 4000 pounds per 1000 board feet. Respondent denies that a copy of the contract is attached to the libel filed herein as Schedule A thereof, and excepts to said libel for the failure to so attach the same.

5. The fifth article of the libel filed herein is denied.

6. The sixth article of the libel filed herein is denied.

7. The seventh article of the libel filed herein is denied.

8. Respondent admits that libelant has transported timber shipped by it to Alexandria, Egypt, as set forth in the [fol. 8] eighth article of the libel filed herein, but respondent avers that said shipment was delayed and did not reach Alexandria, Egypt, until April 17, 1941, approximately four months after the date of sailing from Jacksonville, Florida. Further answering said article of the libel filed herein, respondent shows that it fully paid all carrying charges attributable to said shipment and that it has been injured and damaged by the libelant in connection with the handling of said shipment as hereinafter set forth.

9. Respondent denies the allegations of article nine of the libel filed herein, but admits that the alleged cause of action is within the admiralty and maritime jurisdiction of this Court.

10. Further answering, respondent alleges that at the time of entering into the freight contract referred to by libelant, it endeavored to secure a contract covering the transportation of 890,000 board feet of pine timber, but

was informed and advised by libelant, through Cavalier Shipping Company, Inc., its brokers, that the capacity of the ship had been contracted for the trip to Alexandria, Egypt, to the extent that 750,000 board feet of pine timber, weighing not exceeding 4000 pounds per 1000 board feet, would constitute the maximum amount of timber which could be transported for this respondent, and that the remaining 140,000 board feet which respondent desired to ship could not be carried because of lack of space and tonnage. Upon this basis, the original contract declared upon was entered into, with the weight referred to erroneously inserted as 4 pounds per 1000 board feet and not 4000 pounds per 1000 board feet as agreed upon between the parties, and with this error manifest upon a casual inspection of the contract, evidencing an impossible weight of pine timber, and the correction thereof now acquiesced in by the allegations of the libel filed herein. After the [fol. 9] steamer Kotor cleared from New York for Jacksonville, respondent was advised by the libelant, through Cavalier Shipping Company, Inc., that if the timber shipped by respondent did not weigh in excess of 4000 pounds per 1000 board feet, said steamship could carry approximately 50,000 board feet in addition to that covered by said contract, if respondent desired to avail itself of the opportunity of making said shipment. Upon this basis, respondent procured additional timber for shipment, and upon said steamer arriving at Jacksonville, respondent delivered to it for transportation to Alexandria, Egypt, 756,745 board feet of timber and an additional amount of 54,971 board feet, all of which was duly accepted by said steamship, and for which bill of lading was subsequently issued. Respondent specifically denies that the timber shipped by it under the original terms of the contract declared upon exceeded in weight 4000 pounds per 1000 board feet, and specifically denies that the steamship Kotor went down to its marks before it had loaded its full cargo, and, on the contrary, alleges that it did not go down to its marks until it had loaded the 750,000 board feet originally referred to in said contract, as well as 61,716 board feet in addition thereto, for all of which respondent paid the full freight charge provided in the contract declared upon and received bills of lading therefor, upon the basis provided of $70.00 per 1000 board feet.

Further and Separate Defenses

1. Further answering said libel and as further and separate defenses thereto, respondent alleges that said steamship Kotor was due to arrive in Jacksonville for loading on November 25, 1940, and that respondent accordingly shipped to Jacksonville the timber to be loaded, and arranged for the presence of its representatives, J. C. Wickliffe and E. C. Parker, in Jacksonville, for the purpose of checking and inspecting said timber as loaded, and secur- [fol. 10] ing the necessary bills of lading therefor. Respondent avers that said shipment of timber should have been loaded, by the exercise of ordinary diligence, within two days' time, that the steamship Kotor did not arrive at the pier for loading until late in the afternoon of November 26, 1940, at which time it loaded two timbers, solely for the purpose of technically recording the beginning of loading on that date. The real loading was not begun until the morning of November 27, 1940, with no effort made to expedite the work of loading and with said work delayed so that it was not completed until the afternoon of December 4, 1940, or a total time consumed of eight days in loading said timber, which should have been loaded within forty-eight hours, by the exercise of ordinary diligence. This delay resulted in respondent being forced to pay for the additional time required of its representatives and their expenses in Jacksonville for a period of six days. Respondent alleges that the extra time required of its said representatives required the payment by it of $200.00 to J. C. Wickliffe and $50.00 to E. C. Parker, together with the payment of $50.00 for the expenses of said two representatives during said period of time in Jacksonville.

2. Respondent further alleges that upon the completion of the loading of said ship, the Master thereof refused to issue a bill of lading for the goods so received, unless and until he was paid freight in excess of the amount properly chargeable thereon, at first demanding the payment of an excess amount of $9,300.00, and later reducing said demand to $6,000.00, with the result that respondent, in an effort to secure the bill of lading to which it was entitled upon the payment of the proper charges on said shipment of $70.00 per 1000 board feet, was forced to employ the firm of Ragland, Kurz & Layton, attorneys at law of Jacksonville, Florida, and through them to make further demands for

said bill of lading, which was ultimately delivered upon the demand of said attorneys. Respondent alleges that [fol. 11] said attorneys charged $100.00 for their services in connection with securing said bill of lading, that said charge was reasonable for the services involved, and that it has been forced to expend said amount by reason of the arbitrary action of the Master of the steamship Kotor in declining to deliver said bill of lading.

3. Respondent alleges that as a result of the acts above set forth it has been injured and damaged in connection with said shipment in the gross sum of $400.00, which it is entitled to recover from said libelant by way of recoupment in the present action.

Wherefore, respondent prays that the said libel and complaint be disinissed with costs, and that it do have and recover a decree against the libelant for its damages sustained as herein set forth.

Georgia Hardwood Lumber Company, by O. R. Cheatham, President. Hull, Barrett, Willingham & Towill, Proctors for Respondent.

Duly sworn to by O. R. Cheatham. Jurat omitted in printing.

[fols. 12-18] STATE OF GEORGIA,
Richmond County:

Due and legal service of the within answer, together with a copy thereof, is hereby acknowledged. All other and further service and notice is hereby waived.

This 12th day of June, 1941.

Dow, McAllister & Symmers, Cumming, Harper & Nixon, Proctors for Libelant.

[fol. 19] IN UNITED STATES DISTRICT COURT

OPINION

ARCHIBALD B. LOVETT, Judge:

This is a suit in admiralty.

Claiming that the respondent furnished a cargo heavier than specified in the freight contract, the owner-operator

of the ship has sued for freight moneys in excess of the amount paid without prejudice. Issue is joined as to the weight of the cargo.

The contract was for a shipment of 750,000 board feet pine timbers "not exceeding 4 pounds per board foot at $70.00 per 1000 board feet on and/or under deck ship's option" from Jacksonville, Florida, to Alexandria, Egypt.

The cargo consisted chiefly of "water-seasoned" sawed pine timbers varying from 6x6 inches to 10x10 inches and from 16 to 40 feet in length. As distinguished from "air-dried" timbers they were seasoned by storage in water for periods running from several months to a year. These timbers were shipped to Jacksonville via railroad from various points in Florida, Alabama and Mississippi. They were loaded on flat cars at the points of origin and stacked with tiers of separation strips between them; and the butts, because of their random lengths, were spaced apart. The loading on these cars was on different dates, largely between November 15th and 21st, 1940. The cars moved approximately 400 miles by rail before reaching Jacksonville and were unloaded directly from the railroad cars on the dock into the ship. An average period of about two weeks elapsed from the loading on the railroad cars to the loading on the ship. The bills of lading issued by the railroad showed that the average weight of the timbers at or near the interior from where shipped was approximately 4¾ pounds per board foot. These facts coming to the knowledge of the ship, upon arrival in Jacksonville, and while the cars were still in the railroad yards, a controversy arose between the ship and a representative of the respondent concerning the true weight of the timbers at [fol. 28] that time. The ship suggested that sample cars be weighed. The respondent objected but agreed that all of the cars might be weighed. The timbers were not re-weighed at ship-side or elsewhere. The ship arrived at Jacksonville on November 26, began loading the next day, and sailed on December 4, 1940.

The questions are: first, did the timbers weigh more than 4 pounds per board foot when loaded on the ship, and, secondly, if they did, what are the consequences?

The libelant insists that as the timbers weighed more than 4 pounds per board foot when loaded on the railroad cars, in view of the weather and other conditions it should

be assumed they weighed as much when received into the ship, invoking the doctrine that a condition once established is presumed to continue for a reasonable length of time unless altered by an intervening force or circumstance. The respondent replies that the doctrine is inapplicable to an article like wet timbers, and contends the proof shows the timbers while being transported by railroad or in the yards would have dried out sufficiently to bring them within the weight stipulated in the contract; and says further libelant has failed to prove any damages even if it can be assumed the timbers were over-weight.

There is no direct evidence as to the weight of the shipment at ship-side or on board the vessel. Much testimony has been heard from many witnesses, who differ among themselves, as to the amount of moisture that would have evaporated between the time the timbers were weighed and arrived at ship-side, some giving expert opinions that three-fourths of a pound per board foot would be lost and others believing less.[1] The number of board feet of the timbers is known and not in dispute. The freight was paid [fol. 21] at the rate specified according to the board foot measurement.

The first question that arises, therefore, is where the burden of proof lies in a case of this kind. Having alleged in the libel that the weight of the timbers exceeded the maximum stipulated in the contract, holding the affirmative of that issue, it would seem that the onus at the beginning of the trial was on the libelant. If neither party had offered evidence the libelant would have been compelled to submit to an adverse judgment on the pleadings.[2] But it was shown that the weight exceeded the stipulated maximum when the timbers were loaded on the railroad cars. Is this sufficient to create a presumption that the weight was excessive when the timbers were loaded on the ship,

[1] It may be assumed that if parties to a contract express the freight rate with a guaranteed maximum weight per freight unit, or with a guaranteed minimum weight per cubic content, the shipper must pay for the excess weight in the one case or deficiency in the other, if the ship loses cargo space in either case. North & South Shipping Co. v. Cargo of Pine Boards, 1926, A. M. C. 839; Barber Steamship Lines v. Sloan & Co., 274 Fed. 365.

thus shifting the burden of proof?[3] I think not. The rule that a state once shown is presumed to continue is not without qualification and is not to be rigidly applied under all circumstances. Where likelihood of change is inherent in the thing itself, i. e., lumber or timbers, green or wet, exposed to the sun and air, whereby it dries and moisture evaporates, the inference of continuance does not arise. The more volatile the situation the less reliable is the presumption of the continuous state.[4] Blocks of ice and blocks of granite weighing the same when the sun shines on them hot do not last equally as long.

The libelant has failed to establish by a preponderance of the evidence that the shipment was over-weight when received on the ship.

[fol. 22] It must be admitted that the weight on board ship and not the weight on board the railroad cars, if they differ, should control the rights of the parties here.[5] Libelant had ample opportunity to weigh the timbers at Jacksonville before they reached ship-side. They were on cars in the railroad yards there. It would have been a simple matter, accompanied with little expense, to weigh them car by car (there were 52) on the railroad track scales. The respondent was willing for this to be done, though its representative objected to weighing sample cars only, saying they would not be representative. There was sufficient time before sailing after the ship arrived for this to be done. The ship declined. "In the absence of any custom

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[3] See 31 C. J. S., Evidence, Sec. 104; 20 Am. Jur., Evidence, Sec. 135.

[3] The burden of proof is here used in the secondary sense to designate an obligation to meet with evidence a prima facie case created against a party, sometimes called "burden of evidence." Mobley v. Lyon, 134 Ga. 125, 128-29.

[4] Jensen v. Logan City (Utah), 57 Pac. (2d) 708, 718; C. C. & St. L. Ry. Co. v. Starks (Ind.), 106 N. E. 646, 651; Cage v. Ansler (Tex.), 217 S. W. 1094; Hawkins v. Byrn (Tenn.) 261 S. W. 980; Bludworth v. Bray (Fla.), 52 So. 957; Lehigh Etc. Co. v. Trotter (N. J. Eq.), 9 Atl. 694; Wigmore on Evidence (3d Ed.), Vol. 2, Sec. 437; 55 C. J., Sales, Sec. 387; 22 Am. & Eng. Enc. L., p. 1239.

[5] Christie v. Davis Coal & Coke Co., 95 Fed. 837 (1), 838-39.

to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing."[6] Or the ship's draft marks could have been used before and after loading as a scale for determining the weight at least with some approximation. If so used, the result has not been shown.

The suggestion is made that the Carriage of Goods by Sea Act[7] forecloses respondent from disputing the weights shown by the ocean bill of lading. While such lading is prima facie evidence of the receipt of the goods as described, including the weight, the trouble here is I do not know that they recited any weights. The copies of the bills of lading were offered in evidence by the libelant without formal proof that they were true copies. The respondent objected to their being received because in the copies it held, furnished by the ship's agent, no weights appeared. The original bills of lading were not produced. Being order bills presumably they were surrendered to the ship at the port of discharge. There is some indications in the evidence that the weight was inserted in kilos and not in [fol. 23] pounds, for the purpose of calculating Suez Canal tolls, but when or by whom the weights may have been written and whether before or after the bills were turned over to the shipper, I do not know. Respondent's representative at Jacksonville could not remember, but the fact that the copies furnished him by the ship's agent contained no weights gives some support to the view that they must have been written into the ladings during the course of the voyage and were not in the originals when respondent received them and turned them over to the bank along with the other documents necessary for the collection of the price of the timbers sold. The copies of the bills of lading offered in evidence were finally admitted in evidence with the weights deleted by agreement of the parties.

Respondent also urges that even if a breach of warranty as to the weight of the timbers can be assumed libelant cannot recover, as there was no proof that any cargo was shut out or that any freights were lost, inasmuch as this

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[6] Per Willes, J., in Couldthurst v. Sweet, L. R. 1 C. P. 649; Scrutton on Charter Parties (14th Ed.), p. 419, note (p).

[7] 46 U. S. C., Sec. 1303 (4), (3b).

action is not for "dead freight" but is only for additional moneys in excess of the amount paid.

In view of my conclusions that over-weight has not been established by a preponderance of the evidence it seems unnecessary to pass on this last question.[8]

The libel will be dismissed.

This 5th day of December 1942:

(Signed) Archibald B. Lovett, United States Judge.

[fol. 24] In United States District Court

Findings of Fact—Filed April 20, 1943

1. Libelant, owner of the Panamanian S/S Kotor and respondent entered into a contract dated November 13, 1940, which, as corrected for a typographical error by stipulation of the parties, provided for a shipment of 750,000 board feet pine timbers "not exceeding 4 pounds per board foot at $70. per 1000 board feet on and/or under deck ship's option" from Jacksonville, Florida, to Alexandria, Egypt.

2. The cargo consisted chiefly of "water-seasoned" sawed pine timbers varying from 6x6 inches to 10x10 inches and from 16 to 40 feet in length. As distinguished from "air-dried" timbers they were seasoned by storage in water for periods running from several months to a year. These timbers were shipped to Jacksonville via railroad from various points in Florida, Alabama and Mississippi. They were loaded on flat cars at the points of origin and stacked with tiers of separation strips between them; and the butts, because of their random lengths, were spaced apart. The loading on these cars was on different dates, largely between November 15th and 21st, 1940. The cars moved approximately 400 miles by rail before reaching Jacksonville and were unloaded directly from the railroad

[8] See, however, Excelsior Coal Co. v. Gildersleeve, 160 Fed. 47; Barnet v. Luthur, 2 Fed. Cases, No. 1025; Herbst v. The Asiatic Prince, 97 Fed. 343; Munson v. Straits of Dover S. S. Co., 102 Fed. 926; In re Cal. Nav. & Imp. Co., 110 Fed. 670, 677; North & South Shipping Co. and Barber Steamship Lines cases, cited supra in f. n. 1.

cars on the dock into the ship. An average period of about two weeks elapsed from the loading on the railroad cars and the loading on the ship.

3. The bills of lading issued by the railroads showed that the average weight of the timbers at or near the interior from where shipped was approximately 4$\frac{3}{4}$ pounds per board foot. These weights were ascertained by the railroads for the purpose of assessing freight charges. 570,000 feet of the timbers involved were loaded on freight [fol. 25] cars at the point where they were removed from the pond and were moved a distance of forty-four miles to the point at which they were weighed. This timber was weighed on the day following the removal from the pond. 50,029 feet of the timber was similarly moved a distance of sixty miles from the point where it had been stored in water to the point where it was weighed. After the timbers were removed from the pond, until they were loaded on the ship, they were exposed to conditions which would tend to cause their moisture content to evaporate with a consequent loss of weight.

4. Libelant's agent in Jacksonville acquired knowledge of the railroad loading weights when the cars arrived at Jacksonville, while the 52 cars which comprised respondent's shipment were still in the railroad yards. A controversy arose between the libelant's agent and a representative of the respondent concerning the true weight of the timbers at that time. The libelant's agent suggested that sample cars be weighed. The respondent's representative objected to weighing sample cars only, on the ground that they would not be representative, but he was willing that all of the cars be weighed. The libelant's agent declined on the ground that it would cause too much delay in loading the ship.

5. The ship arrived at Jacksonville on November 26, 1940, began loading the next day, and sailed on December 4, 1940. There was sufficient time after arrival of the timbers at Jacksonville and before loading, for the cars containing the timbers to be weighed on the railroad track scales, which would have been a simple matter accompanied with little expense. The timbers were not reweighed at ship-side or elsewhere.

6. The respondent shipped the full contract quantity of 750,000 board feet, plus an additional quantity under a [fol. 26] second booking, the whole consisting of 811,710 board feet, which were loaded on the vessel. The respondent paid the freight at the rate specified according to the board foot measurement, and the libelant accepted payment thereof without prejudice to its contention that the timbers exceeded the weight specified in the contract.

Conclusions of Law

1. The weight of the respondent's shipment on board ship and not the weight on the railroad cars at other times and places, should control the rights of the parties.

2. The burden of proof that the respondent's shipment exceeded 4 pounds per board foot when loaded on the S. S. Kotor at Jacksonville rested upon the libelant.

3. Evidence that the weight of the timbers exceeded the stipulated maximum when they were loaded on the railroad cars does not create a presumption that the weight was excessive when the timbers were loaded on the ship, and does not shift the burden of proof which remained with the libelant.

4. The rule that a state once shown is presumed to continue is not without qualification and is not to be rigidly applied under all circumstances.

5. Where likelihood of change is inherent in the thing itself, i. e., lumber or timbers, green or wet, exposed to the sun and air, whereby it dries and moisture evaporates, the inference of continuance of weight does not arise. The more volatile the situation the less reliable is the presumption of continuous state.

6. Under the facts and circumstances disclosed by the evidence there is no presumption that the weight of re- [fol. 27] spondent's timber when loaded on the ship was in excess of the maximum specified in the contract, viz., 4 pounds per board foot.

7. The rights of the parties should not be governed by assumptions of the weight of respondent's timbers upon loading on board the vessel, particularly in view of the libelant's failure to obtain the best evidence by adopting

the reasonable procedure of determining the actual weight of the timbers by means of railroad scales or the approximate weight by means of ascertaining the ship's drafts and immersion scale during loading.

8. In the absence of proof that the ocean bills of lading, when issued by the libelant, recited the weights of the timbers, the Carriage of Goods by Sea Act does not foreclose the respondent from disputing the libelant's assertions concerning the weights.

9. The libelant has failed to establish by a preponderance of the evidence that the respondent's shipment exceeded the maximum weight specified in the contract.

10. The libel should be dismissed with costs.

Augusta, Georgia, April 20, 1943.

Archibald B. Lovett, United States District Judge.

Copy received and no objections as to form.

Cumming, Harper & Nixon.

[fol. 28] IN UNITED STATES DISTRICT COURT

In Admiralty No. 4

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S Kotor, Libelant,

against

GEORGIA HARDWOOD LUMBER COMPANY, Respondent

FINAL DECREE—April 20, 1943

The above cause having on the 24th day of June, 1942, been duly heard upon the pleadings and proofs, having been submitted by the advocates of the respective parties, and due deliberation having been had, and the Court having on the 5th day of December, 1942, filed its decision and opinion in writing directing that the libel herein be dismissed, and the Court having filed its findings of fact and conclusions of law pursuant to Supreme Court Rule 46½, and respondent's costs having been duly taxed in the sum of $111.90, it is now, on motion of Hull, Barrett, Willingham & Towill, proctors for the respondent,

Ordered, adjudged and decreed that the libel of Compania de Navegacion Transmar, S. A., herein be and the same hereby is dismissed; and it is further

Ordered, adjudged and decreed that the respondent, Georgia Hardwood Lumber Company, have, receive and recover of and from Compania de Navegacion Transmar, S. A., libelant, the sum of $111.90, its costs as taxed, with interest from the date of this decree until paid, and it is further

[fol. 29] Ordered, adjudged and decreed that unless this decree be satisfied, or proceedings thereon stayed by an appeal within ten days after service of a copy of this decree with notice of entry on the libelant or its proctors, the respondent have execution against the libelant and its stipulators for costs, their goods, chattels and lands, forthwith to satisfy this decree.

Archibald B. Lovett, United States District Judge.

[fol. 30] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 12, 1943

Suits:

Please Take Notice, that the Libelant, Compania De Navegacion Transmar, S. A., in the above entitled cause hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit to be held in the United States Court House, City of Atlanta, Georgia, from the final decree of this Court entered herein on the 20th day of April, 1943, and from each and every part of the said decree.

Dated, New York, July 6, 1943.

Yours, etc., Cummings, Harper & Nixon; Dow & Symmers, Proctors for Libelant.

910-915 Marion Building, Augusta, Georgia.

To: Hull, Barrett, Willingham & Towill, Esqs., Proctors for Respondent, Augusta, Georgia.

Carpenter & Stevenson, Esqs., Respondent's New York Correspondents, 70 Pine Street, New York City.

[fol. 31] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL

To the Honorable the Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of Compania de Navegacion Transmar, S. A., Libelant, respectfully shows as follows:

1. That on or about the 10th day of May, 1941, the libelant filed its libel in the District Court of the United States, for the Augusta Division of the Southern District of Georgia, against Georgia Hardwood Lumber Company, in a cause of contract, civil and maritime, to recover $9,304.00 for alleged damages to the libelant by reason of which respondent's shipment of cargo exceeded its contract maximum weight as will more fully appear by reference to the libel; that on or about the 13th day of June, 1941, respondent, Georgia Hardwood Lumber Company, filed together with a stipulation for costs its answer to the libel.

2. On June 24th, 1942, this cause came on for trial and argument before Honorable Archibald B. Lovett, in the United States Court House, Augusta, Georgia, and at the close of the trial, the Court rendered its opinion, findings of fact and conclusions of law dismissing libelant's libel and complaint, and thereafter on April 20, 1943, a final decree was made and entered in this case whereby it was ordered, adjudged and decreed that the libel be dismissed, and that respondent recover its costs taxed in the sum of $111.90.

3. Libelant is advised and believes that a final decree, opinion, the findings of fact and conclusions of law rendered are erroneous, and that the opinion, findings of fact and conclusions of law did not adjudge and the final decree did not decree that libelant recover from respondent the sum of $9,304.00, together with interest and costs.

[fol. 32] Your Petitioner therefore prays that it may be allowed to appeal from the final decree to the next term of the Circuit Court of Appeals for the Fifth Circuit, and that a transcript of the record of the proceedings and papers upon which the decree was made, duly authenticated, may be sent accordingly to the Circuit Court of Appeals and that the usual citation may issue in order that the decree

may be fully reviewed and may be reversed by the Circuit Court of Appeals insofar as it orders and decrees the several matters alleged as error in the assignment of errors filed herewith.

(Signed) Dow & Symmers, (Dow & Symmers) Proctors for Libelant, 70 Pine Street, New York, N. Y.

(Signed) Cumming, Harper & Nixon, (Cumming, Harper & Nixon) Proctors for Libelant, 910-915 Marion Building, Augusta, Georgia.

Duly sworn to by Wilbur E. Dow, Jr. Jurat omitted in printing.

It is Ordered that the appeal herein be allowed as prayed for.

(Signed) Archibald B. Lovett, District Judge.

Dated: August 13, 1943.

[fol. 33] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 21, 1943

The libelant, Compania De Navegacion Transmar, S. A., hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above entitled action as follows:

1. The District Court erred in finding that an average period of about two weeks elapsed from the loading on the railroad cars to the loading on the ship.

[fol. 34] 2. The District Court erred in finding that after the timbers were removed from the pond, until they were loaded on the ship, they were exposed to conditions which would tend to cause their moisture content to evaporate with a consequent loss of weight.

3. The District Court erred in failing to find that the timbers were substances of such a nature that they would resist and retain their moisture content though effected by conditions which would tend to cause their moisture content to evaporate with a consequent loss of weight.

4. The District Court erred in finding that there was sufficient time after arrival of the timbers at Jacksonville

and before loading, for the cars containing the timbers to be weighed on the railroad track scales, which would have been a simple matter accompanied with little expense.

5. The District Court erred in finding that the vessel was loaded with an additional quantity (of timber) under a second booking.

6. The District Court erred in finding that the respondent paid the freight at the rate specified according to the board foot measurement.

7. The District Court erred in failing to find that during the time from the weighing of the timbers on the railroad cars to the loading of them aboard ship, the atmospheric conditions through which the lumber moved had an average humidity of 90% saturation.

8. The District Court erred in failing to find that the respondent unreasonably refused to recheck the weight of sample cars at Jacksonville.

[fol. 35] 9. The District Court erred in failing to find that it was customary to weigh timbers as promptly as possible after shipment and this weight is presumed to continue through export.

10. The District Court erred in failing to find that the weight of "Longleaf Merchantable Sawn Pine Timbers, Rough" would not seem to be appreciably effected by the type of storage on the railroad cars and by the conditions within the area in which it passed in transit, and by the conditions existing up to the time it was loaded on the vessel.

11. The District Court erred in holding that the weight of the respondent's shipment on board ship and not the weight on the railroad cars at other times and places, should control the rights of the parties.

12. The District Court erred in holding that the burden of proof that the respondent's shipment exceeded 4 pounds per board foot when loaded on the S/S Kotor at Jacksonville rested upon the libelant.

13. The District Court erred in holding that the evidence that the weight of the timbers exceeded the stipulated maximum when they were loaded on the railroad cars does not

create a presumption that the weight was excessive when the timbers were loaded on the ship, and does not shift the burden of proof, if any, that remained with the libelant.

14. The District Court erred in holding that where likelihood of change is inherent in the thing itself, i. e., lumber or timbers, green or wet, exposed to the sun and air, whereby it dries and moisture evaporates, the inference of continuance of weight does not arise. The more volatile the situation the less reliable is the presumption of continuous state.

[fol. 36] 15. The District Court erred in holding that under the facts and circumstances disclosed by the evidence there is no presumption that the weight of respondent's timbers when loaded on the ship was in excess of the maximum specified in the contract, viz., 4 pounds per board foot.

16. The District Court erred in holding that rights of the parties should not be governed by assumptions of the weight of respondent's timbers upon loading on board the vessel particularly in view of the libelant's failure to obtain the best evidence by adopting the reasonable procedure of determining the actual weight of the timbers by means of railroad scales or the approximate weight by means of ascertaining the ship's drafts and immersion scale during loading.

17. The District Court erred in holding that in the absence of proof the ocean bills of lading, when issued by the libelant, recited the weights of the timbers, the Carriage of Goods by Sea Act does not foreclose the respondent from disputing the libelant's assertions concerning the weights.

18. The District Court erred in holding that the libelant has failed to establish by a preponderance of the evidence that the respondent's shipment exceeded the maximum weight specified in the contract.

19. The District Court erred in dismissing the libel with costs.

20. The District Court erred in failing to hold that the presumption of continuance of conditions shown to exist at the time the timbers were weighed on the railroad cars existed until the contrary was established.

21. The District Court erred in directing a decree for the respondent.

[fols. 57-104] 22. The District Court erred in failing to hold that libelant had established a prima facie case.

23. The District Court erred in failing to hold that the shipment had not met the burden of going forward with the evidence.

24. The District Court erred in failing to hold that respondent failed to meet its burden of proof.

Dated, July 15, 1943.

Cumming, Harper & Nixon, Esqs., Proctors for Libelant, 910-915 Marion Building, Augusta, Georgia.

Dow & Symmers, Esqs., by Joseph B. Cumming, Proctors for Libelant, 70 Pine Street, New York, N. Y.

Bond on appeal for $250.00, filed July 21, 1943, omitted in printing.

[fol. 108] In United States District Court

Stipulation, Settling the Record—Filed August 19, 1943

It Is Hereby Stipulated And Agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

Dated, August 19th, 1943.

Cumming, Harper & Nixon, Proctors for Libelant Appellant; Hull, Barrett, Willingham & Towill, Proctors for Respondent Appellee.

In United States District Court

Praecipe for Record—Filed August 14, 1943

To Scott A. Edwards, Clerk of the United States District Court for the Southern District of Georgia, Augusta Division:

We hereby request that the record on appeal in the above entitled case shall include the following:

1. Docket Entries.

2. Libel.

[fol. 109] 3. Respondent's Answer.

4. Libelant's demand for admission of facts, omitting copies of freight bills thereto attached; which is the same as Plaintiff's Exhibit No. 2.

5. Respondent's admission of facts.

6. Opinion.

7. Finding of facts and conclusions of law.

8. Final Decree.

9. Notice of Appeal.

10. Petition and Order allowing appeal.

11. Assignment of Errors.

12. Appeal bond.

13. Stenographic Record in the District Court, including:

(a) Testimony of libelant taken in Court of C. C. Royal.

(b) Testimony of respondent taken in Court of:

Mr. Parker,
F. L. Lancaster,
W. E. Dunham,
E. C. Boone,
P. N. Goffigan,
J. C. Wickliffe.

14. Plaintiff's Exhibit No. 1.

[fol. 110] 15. Stipulation as to Exhibits.

16. Stipulation settling Record.

17. Clerk's Certificate.

Cumming, Harper & Nixon, Dow & Symmers, Proctors for Libelant; Hull, Barrett, Willingham & Towill, Proctors for Respondent, by Carpenter & Stevenson, Associate Proctors.

[fol. 111] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 112] In the District Court of the United States for the Southern District of Georgia, Augusta Division

In Admiralty No. 4

Compania De Navegacion Transmar, S. A., Owner of the S/S Kotor, Libelant,

vs.

Georgia Hardwood Lumber Company, Respondent.

Order Allowing Appeal—Filed August 30, 1943

It having come to the attention of the Court that the notice of appeal in the above stated case filed with the Clerk on July 12, 1943, after service of a copy thereof had been made on opposing proctors, failed to have any allowance thereof entered thereon by the Judge of this Court, and it had been assumed by the leading proctors for libelant—now appellant—that the Clerk of this Court would present the said notice to the Judge of this Court for an allowance of the appeal to be entered thereon by the Judge, which is the procedure followed in the Second Circuit where proctors reside and principally practice, and that it was by reason of their reliance upon the Clerk of this District following the same procedure as the Second Circuit that there is not in the record any allowance of the appeal prior to the order allowing the appeal as prayed for in a petition therefor filed by appellant on August 12, 1943, which, however, was subsequent to the expiration of the ninety day period following the date of the final decree; and the Judge of this Court having learned during the said ninety day period of the inten-
[fol. 113] tion of appellant to appeal from the final decree and had not indicated any intention to disallow the same, and undoubtedly would have allowed the appeal if and when so requested, though he had been of the opinion that under Rule 12 (last par.) and Rule 10 (1) of the United States Circuit Court of Appeals for the Fifth Circuit formal allowance was no longer necessary,

Now, therefore, in order that the record may show said allowance of the appeal prior to the expiration of said ninety day period and thus supply any omission that may have been caused by the said assumption of the leading proctors for the appellant so that substantial justice may be done,

It is Ordered, that the said appeal be and the same is hereby allowed nunc pro tunc as of July 12, 1943, and it is further Ordered that this Order be filed and made a part of the record in the above stated case and that a copy thereof accompanied by a certificate of the Clerk of this Court be transmitted to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to become a part of the record of this case already of file herein.

This August 30th, 1943.

Archibald B. Lovett, United States District Judge, Southern District of Georgia.

[fol. 114] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 114a] United States Circuit Court of Appeals for the Fifth Circuit, District Court of the United States for the Southern District of Georgia, Augusta Division

No. 10,796

In Admiralty

Compania De Navegacion Transmar, S. A., Owner of the SS. Kotor, Libelant,

against

Georgia Hardwood Lumber Company, Respondent

Citation of Case on Appeal

The President of the United States, to Georgia Hardwood Lumber Company:

You are hereby cited to be and appear in the United States Circuit of Appeals for the Fifth Circuit, to be held in the City of New Orleans, Louisiana, within thirty days from the date of this Citation pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Southern District of Georgia, Augusta Division, in which Compania de Navegacion Transmar, S. A., is the Appellant and Georgia Hardwood Lumber Company is the Appellee, to show cause, if any there may be, why the decree complained of by said appeal should

not be reversed and a decree entered in favor of the Appellant as sought by its appeal.

Witness the Honorable Archibald B. Lovett, Judge of the United — District Court for the Southern District of Georgia.

This 16 day of August, 1943.

(Signed) Archibald B. Lovett, United States Judge.

Service of the foregoing citation and receipt of a copy thereof acknowledged, this 17 day of August, 1943.

(Signed) Hull, Barrett, Willingham & Towill,

(Signed) Carpenter & Stevenson, Proctors for the Appellee. Entered on Minute Book "I" at Page 37. (Signed) Dorothy H. Murray, Deputy Clerk, 8-18-43.

U. S. District Court, Augusta Division. Filed in Clerk's Office 11:30 A. M., Aug. 17, 1943, Scott A. Edwards, Clerk, (Signed) by Orlena T. Weaver, Deputy Clerk, D. E.

(Original Filed September 10, 1943)

[fol. 114b] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 115] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 1st, 1944

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S "KOTOR",

versus

GEORGIA HARDWOOD LUMBER COMPANY

On this day this cause was called, and, after argument by Wilbur E. Dow, Jr., Esq., for appellant, and John Tilney Carpenter, Esq., for appellee, was submitted to the Court.

[fol. 116] OPINION OF THE COURT—Filed April 5, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S "Kotor", Appellant,

versus

GEORGIA HARDWOOD LUMBER COMPANY, Appellee

Appeal from the District Court of the United States for the Southern District of Georgia

(April 5, 1944)

Before Hutcheson, Holmes, and Lee, Circuit Judges.

HUTCHESON, Circuit Judge:

The suit by libel *in personam* was for $9,304.00 freight money on pine timbers weighing 531,656 pounds or 265.82 tons, at $35.00 per ton, from Jacksonville, Florida, to Alex-

andria, Egypt. The claim was that libellant and respondent had agreed that libellant should carry "750,000 board feet of pine timbers, not exceeding four pounds per board foot, at [fol. 117] $70.00 per 1000 feet", or $35.00 per short ton; that instead of 4 pounds, the timbers libellant had carried had averaged 4.75 pounds per board foot; the shipment as a whole had weighed 531,656 pounds in excess of the guaranteed weights; and respondent had not paid libellant for the carriage of this excess weight to its damage in the sum sued for. The respondent admitted: that the contract was as pleaded; that the respondent did load the timbers on the vessel; and that libellant did transport them as alleged. It denied, though, that respondent had loaded, and libellant had carried, any excess weight; and put libellant on its proof.

On the trial it was established: that the contract was made as pleaded; that the timbers were purchased and shipped from different points throughout Florida, Alabama, and Mississippi, 75 percent coming from Century and Gulf Hammock, Florida, and Brewton, Alabama; and that most of them had been water stored, i. e., had been in mill ponds from two months to a year. This fact of water storage and the possible or probable subsequent drying out of the timbers was permitted to dominate and give direction to the case.[1]

[1] There was testimony showing that: hoisted aboard flat cars, the Century and Brewton lots were carried from 40 to 60 miles by rail to Pensacola, the Gulf Hammock to Dunnellon, and there weighed the day after they were loaded, some 24 to 48 hours after leaving the water, they were carried thence to Jacksonville, a distance of 340 miles from Pensacola and 100 miles from Dunnellon. The cars arrived at various railroad yards in Jacksonville between Nov. 19th and Dec. 1st, in an average of 4.3 days after they were weighed. Of the 38 cars of the Century lot, 25 arrived between Nov. 19th and Nov. 23rd, 11 on the 27th, and one on Dec. 1st; two of the three Brewton cars arrived on the 27th and the third on the 1st. The Gulf Hammock car arrived on Nov. 26th. The Kotor docked on Nov. 26th, and began loading on the morning of the 27th. The cars were moved from the yards to the wharf and the timbers were loaded directly onto the ship. Approximately 10 cars were loaded a day and all of them discharged by Dec. 1st. The maximum

[fol. 118] The district judge, of the opinion that the evidence of the amount of drying and loss of weight that would occur was sufficient to overcome the effect of libellant's proof by the offer of the railroad weights, thought that libellant had failed to sustain its burden of showing that the shipment was overweight when received on the ship. He, therefore, decided against libellant and dismissed the libel.

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period of sixteen and an average period of 10 days elapsed from the time the first car was weighed until the last car was loaded on the vessel. When weighed by certified railway weighing masters, the timbers averaged 4.75 pounds to the board foot. The weights were entered on the railroad bills of lading which showed in addition that the car load lots ranged on an average from 4.3 to 5.23 pounds per board foot. When after remaining in the yards from one to five days the timbers were loaded aboard the ship, the bills of lading were delivered to libellant. The weather throughout the section was extremely humid, particularly at Jacksonville, where it rained every day but two from the time the first car arrived until the last car was loaded aboard the ship. When some of the cars first arrived and libellant's agent learned that the weight of the timber was running heavy, he advised respondent, its agent came down, and controversy arose. Libellant's agent suggested that sample cars be weighed, respondent's agent objected to weighing sample cars and insisted that all the cars be weighed. Libellant's agent objected on the ground that it would cause too much delay in loading the ship. There was testimony that a test weight could be obtained by weighing sample cars and libellant's expert testified that he had never known of the practice of weighing timbers at a port after they had been weighed at an interior point where it was customary to weigh them. It was testified that when water stored timbers are taken out of the water they weigh a little more than green timber. Seasoned timber weighs less than green or water seasoned. The average weight of green timbers of the size of those in this case is 4½ pounds. It would take at least a year to sun dry green timbers to bring them down to the 3.6 pounds per board foot of such timbers; water stored timbers taken out of the water would be considered dried in four to six months. The extent or amount of loss of moisture content of green or water seasoned timber depends on conditions and varies from time to time.

Libellant is here insisting that the judgment be reversed. Respondent, insisting that the judgment is supported by the evidence and may not be reversed, moves to dismiss the appeal because not timely applied for.[2]

[fol. 119] The point as to our jurisdiction is quite a serious one. Because, as expressly provided in Rule 81(a)(1), The Federal Rules of Civil Procedure do not apply in admiralty,

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When water stored timber is taken out of water, its moisture content has a tendency to equalize with the atmospheric conditions. Heat has very little to do with its equalizing. Wind is much better than sunshine. Circulation is the principal drying quality. There was testimony of witnesses that in their opinion the timber would lose weight between the time it was weighed and the time it reached Jacksonville, ten, twelve to fifteen percent, according to which estimates, if accepted, the timber would have had an average weight of 31 pounds over the guaranteed weight.

[2] This is the record: On April 20, 1943, a final decree dismissing the libel was entered, and appellant did not within the 90 days from that date fixed by statute formally apply for and obtain the allowance of an appeal. Instead, on July 6, it issued, served on, and obtained the acceptance of respondent's proctors of a notice of appeal, which notice on July 12th it filed in the office of the Clerk of the District Court, at which time proctors for libellant consulted the district judge on the amount of the appeal bond. This, fixed at $250.00, was executed in New York on July 16, and with assignment of errors, was mailed to and filed with the clerk on July 21st. On Aug. 6th, libellant prepared and swore to a formal petition for appeal, filed it on Aug. 12th, and on August 13th, obtained an order of allowance. On Aug. 30, the district judge signed and filed an order that the libellant be allowed an appeal nunc pro tunc as of July 12, 1943, the order reciting that it had been assumed by the proctors for libellant, now appellant, that the clerk of the court would present the notice to the judge for allowance of appeal, and that because of this reliance there is not in the record any allowance of this appeal prior to the order of Aug. 13. The order also recited that the district judge learned during the 90 day period of the intention of appellant to appeal from the decree and had not indicated any

appellate jurisdiction in admiralty depends upon substantial reliance on 28 USCA, Sec. 230. This provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

In *Alaska Packers vs. Pilsbury*, 301 U. S. 174, decided before the adoption of the new Federal Rules, the United States Supreme Court held that a rule, of the circuit court of appeals, which substituted notice for an application for and allowance of an appeal was invalid, and that an appeal from a final judgment not applied for within the ninety days was invalid. In *The Fannie "D"*, 112 F. (2) 347, the Fifth Circuit, and in *Blaske vs. Dick*, 126 F. (2) 96, the Seventh Circuit held that an appeal from an interlocutory decree in admiralty must be applied for and allowed within the fifteen days fixed by statute, and that the ninety days' period fixed in the Civil Rules was not applicable.

[fol. 120] Appellee relies upon the holding of these decisions that the statutory requirement that an application for appeal must be made within the time fixed is not a technicality which can be waived. He relies, too, on decisions like *Ross vs. White*, 32 F. (2) 750; *Camden v. City of Cincinnati*, 241 Fed. 846; and others decided on appeals other than in admiralty, before the new rules went into effect, that the mere filing with the clerk of an application for or notice of appeal not presented to the judge cannot be construed as a properly filed application. As to the *nunc pro tunc* order of the district judge, appellee points out that if it was made at a time when the court, for want of an application timely filed, had lost jurisdiction, the judge could not, by calling his order a *nunc pro tunc* one,

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intention to disallow the same, and undoubtedly would have allowed it if, and when so requested, though he was of the opinion that under rule 10(1) (Appeals in Civil Action) and rule 12 (Appeals in Admiralty), last paragraph (Appeals in Admiralty are otherwise covered by the general rules of the court) of the United States Circuit Court of Appeals for the Fifth Circuit, formal allowance was no longer necessary.

confer on himself a jurisdiction which had already been lost.

Appellant concedes that if the notice of appeal it filed and the action taken by the judge in fixing the bond within the ninety days cannot be treated as an application for appeal, the application later filed and the orders of the judge would be unavailing. It insists though that what it did must be regarded as an application for appeal, and it points to the authorities holding that if an application is timely filed, the order granting the appeal may be made after the time has expired. Of the "Aalska" case, it argues: that there was no order there allowing the appeal, the rule having undertaken to do away with the necessity for an order by providing that an appeal could be taken by simply giving notice; that all that was held in that case was that that rule was not valid and that the statute requiring application and allowance must be complied with. As to the *Fannie "D"* and the *Blasky* cases, *supra*, it points out that there the decision was not that a notice under the new rules if timely made could not be taken as an application for an appeal. It was that an interlocutory appeal in [fol. 121] admiralty required to be taken within fifteen days could not be taken later.

Appellant, invoking cases like *Brandies v. Cochrane*, 106 U. S. 262; *U. S. v. Beaman*, 61 Fed. (2) 493; *The Ruth*, 20 Fed. (2) 314; *U. S. vs. Todar*, 41 Fed. (2) 146; *Donaldson v. Baltimore Acc. Corp.*, 38 Fed. (2) 215; where it is held that if the application is timely filed, the allowance may be made later, puts its final allowance on cases like *R. F. C. vs. Prudence Group*, 311 U. S. 579; *Crump v. Hill*, 104 Fed. (2) 36; *Baxter v. Savings Bank*, 92 Fed. (2) 404; *Wilson vs. Alliance Life*, 102 Fed. (2) 365; which hold in effect that it would be "a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice" to deprive a litigant of his right to appeal merely because, though it plainly appeared that he was intending to, and thought he was doing what was necessary to, appeal, he took his steps informally instead of formally.

We agree with appellant. It is quite plan that it was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the *Alaska* case, which, though not directly in point, is

disturbing, we should not hesitate to hold: that what appellant did amounted to a timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established. It is quite clear that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve. We think that *R. F. C. vs. Prudence Group* and the other cases cited above warrant our taking jurisdiction and denying the motion to dismiss.

On the merits, we think it clear that appellant is right. The evidence of the rail weights was sufficient unless overthrown to entitle libellant to judgment. In the face of the positive rail weights obtained and furnished by the respondent, it was not sufficient for respondent to offer opinion testimony of the vague and unsatisfactory nature of that offered. This is especially true not only because this evidence taken as a whole lacks convincingness but because it shows not that there was not, but that there was, some excess weight. This does not mean that the opinion testimony that the timbers would dry and had to some extent dried must be wholly rejected. It does mean, though, that taking the record as a whole, the judge's view of it, that the effect of the offer of the railroad weights establishing excess weight had been entirely overthrown, is not a sound one.

[fol. 122]

The motion to dismiss the appeal is denied, the judgment is reversed, and the cause is remanded for further and not inconsistent proceedings.

[fol. 123] JUDGMENT

Extract from the Minutes of April 5th, 1944

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S "Kotor",

versus

GEORGIA HARDWOOD LUMBER COMPANY

This cause came on to be heard on the motion filed by appellee on February 26, 1944, to dismiss the appeal herein, and on the transcript of the record from the District Court of the United States for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the said motion to dismiss the appeal be, and the same is hereby, denied; and that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered, adjudged and decreed that the appellee, Georgia Hardwood Lumber Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 124] MOTION AND ORDER STAYING MANDATE—Filed April 21, 1944

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S. S. Kotor, Libelant-Appellant,

against

GEORGIA HARDWOOD LUMBER COMPANY, Respondent-Appellee

SIRS:

Please Take Notice that the respondent-appellee herein will on the 24th day of April, 1944 present the attached

motion and application to the United States Circuit Court of Appeals for the Fifth Circuit at the courtrooms thereof in the Post-Office Building, City of New Orleans, State of Louisiana, at 10:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard.

Dated, New York, N. Y.
April 19, 1944.

Yours, etc., Hull, Barrett, Willingham & Towill, Proctors for Respondent-Appellee, Office & P. O. Address Southern Finance Building, Augusta, Georgia, and Carpenter & Stevenson, Associate Proctors for Respondent-Appellee, Office & P. O. Address 70 Pine Street, Borough of Manhattan, New York City.

To: Dow & Symmers, Esqs. Proctors for Libelant-Appellant, 70 Pine Street, New York, N. Y.

[fol. 125] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S.S. Kotor, Libelant-Appellant,

against

GEORGIA HARDWOOD LUMBER COMPANY, Respondent, Appellee.

Now comes Georgia Hardwood Lumber Company, respondent-appellee in the above entitled action, and moves and respectfully applies to this Court for a stay of the mandate of this Court pending the filing by respondent-appellee in the Supreme Court of the United States of a petition for a writ of certiorari to this Court from the decision of this Court herein entered April 5th, 1944, and pending determination of said petition and the certification from the Clerk of the Supreme Court of the United States, and for such other and further relief as the justice of the cause may require.

Respondent-appellee intends to petition the Supreme Court of the United States for a writ of certiorari to this

Court in order to obtain a review by the Supreme Court of the opinion and judgment of this Court dated April 5, 1944, as stated in the accompanying affidavit of John Tilney Carpenter sworn to the 19th day of April, 1944.

Hull, Barrett, Willingham & Towill, Proctors for Respondent-Appellee, Office & P. O. Address Southern Finance Building, Augusta, Georgia; and Carpenter & Stevenson, Associate Proctors for Respondent-Appellee, Office & P. O. Address 70 Pine Street, New York City.

[fol. 126] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANÍA DE NAVEGACION TRANSMAR, S. A., Owner of the S.S. Kotor, Libelant-Appellant,

against

GEORGIA HARDWOOD LUMBER COMPANY, Respondent, Appellee.

STATE OF NEW YORK,
County of New York, ss.:

John Tilney Carpenter, being duly sworn, deposes and says:

I am a member of the firm of Carpenter & Stevenson, of counsel for Georgia Hardwood Lumber Company, respondent-appellee in the above action, and conducted argument of the appeal in this Court on behalf of said respondent-appellee.

The respondent-appellee intends to apply to the Supreme Court of the United States for a writ of certiorari to this Court in order to obtain a review by the Supreme Court of the opinion and judgment of this Court dated April 5, 1944. Due to distance and the length of time necessary to exchange communications with the Clerk of this Court, I did not, in spite of the fact that I immediately sent to the Clerk of this Court payment for a copy of the opinion as soon as I heard from him that an opinion had been rendered, receive a copy of this Court's opinion until April

12th. I immediately communicated with my client and its counsel in Augusta, Georgia for instructions, but because of distance and length of time necessary for communication, it was not until yesterday that I received instructions to apply for a writ of certiorari. Under the rules of this Court [fol. 127] the mandate of this Court is to issue on April 26th, and there is not sufficient time to prepare a petition and supporting brief before that date.

The petition will be filed promptly and the proceedings carried out as expeditiously as possible.

Accordingly it is respectfully prayed that the mandate of this Court be stayed pending filing of the petition for such a writ of certiorari and determination thereof, and certification of the Clerk of the Supreme Court of the United States.

John Tilney Carpenter.

Sworn to before me this 19th day of April, 1944.
Edith F. Walsh, Notary Public, Queens Co. Clk's No. 2972 N. Y. Co. Clk's No. 748; Reg. No. 432-W-6
Commission expires March 30, 1946. (Seal.)

[fol. 128] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S.S. Kotor, Appellant,

versus

GEORGIA HARDWOOD LUMBER COMPANY, Appellee.

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate

of the clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 21st day of April, 1944.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 129] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 130] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPAGNIA DE NAVEGACION TRANSMAR, S. A., Owner of the S.S. Kotor, Appellant,

versus

GEORGIA HARDWOOD LUMBER COMPANY, Appellee.

On consideration of the application of the Appellee in the above numbered and entitled cause for a further stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a further period of thirty days; from May 21st 1944, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from May 21st, 1944, there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been

given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from May 21st, 1944, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at Houston, Texas, this 19th day of May, 1944.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 131] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the first and second questions presented by the petition for the writ and case transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 132] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTED RECORD—Filed October 28, 1944

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following matter may be omitted from the printed record herein:

1. Libelant's demand for admission of facts, printed at pages 12-17 of the record on appeal in the Circuit Court of Appeals for the Fifth Circuit.

2. Respondent's admission of facts printed at pages 17, 18 of said record.

3. Bill of costs printed at page 29 of said record.

4. Proceedings and testimony on trial before United States District Court, printed at pages 39-101 of said record.

5. Plaintiff's Exhibit 1, printed at pages 101-103 of said record.

6. Stipulation as to exhibits printed at pages 103-107 of said record.

It is further stipulated and agreed that in printing the record for the use of this Court, the following corrections to the record on appeal in the United States Circuit Court of Appeals for the Fifth Circuit be made:

[fol. 133] 1. *Index.* The words "Final Decree entered 4/23/43" shall be changed to "Final Decree entered 4/20/43."

2. *Docket Entries* (page 2 of Circuit Court of Appeals' record) shall contain the following additional matter: "Aug. 30, 1943. Order dated August 30, 1943 allowing appeal nunc pro tunc as of July 12, 1943."

It is further stipulated and agreed that the record for the use of this Court shall contain in full the citation filed in the Office of the Clerk of the United States Circuit Court of Appeals, referred to at page 112 of the record on appeal in said court.

Dated, October 27, 1944.

John Tilney Carpenter, Counsel for Petitioner;
Wilbur E. Dow, Jr., Counsel for Respondent.

Endorsed on Cover: File No. 48633, U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 180. Georgia Hardwood Lumber Company, Petitioner, vs. Compania de Navegacion Transmar, S. A., Owner of SS. Kotor. Petition for writ of certiorari and exhibit thereto. Filed June 20, 1944. Term No. 180 O. T. 1944.

FILE COPY

Supreme Court, U. S.
JUN 20 1914
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1913

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,

Petitioner,
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,

Respondent.
(Libellant-Appellant below).

PETITION OF GEORGIA HARDWOOD LUMBER COMPANY FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT OF PETITION

JOHN TILNEY CARPENTER,
Counsel for Petitioner,
25 Broad Street,
New York City.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,
Respondent
(Libellant-Appellant below).

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Georgia Hardwood Lumber Company, respectfully shows to this Honorable Court as follows:

A. Summary Statement of the Matter Involved

1. The Proceedings in the Lower Courts

This petition for a writ of certiorari by the respondent in an action in admiralty is sought to review a final judg-

ment of the Circuit Court of Appeals for the Fifth Circuit which denied petitioner's motion to dismiss an appeal of respondent herein (libellant-appellant below) from a final decree of the United States District Court for the Southern District of Georgia, Augusta Division, reversed said decree and remanded the cause to the District Court for further proceedings (R. 122).

The action, brought by respondent herein, owner of the Panamanian SS. *Kotor*, arose from a written contract made in November, 1940 for shipment of petitioner's cargo from Jacksonville, Florida, to Alexandria, Egypt. Under the contract petitioner, a Georgia corporation, agreed to ship 750,000 board feet of pine timbers "not exceeding 4 pounds per board foot" at an ocean freight rate of $70 per 1,000 board feet (R. 24, 39, 101-102). Petitioner concededly shipped the entire quantity and paid the full ocean freight at the measurement rate (R. 26, 97). Respondent carrier, however, claiming that the timbers exceeded 4 pounds per board foot in weight, brought this action in personam in admiralty to recover an additional sum of $9,304 for "lost freights on a corresponding amount of tonnage" (R. 3).

The action was tried June 28, 1942 before Hon. Archibald B. Lovett, United States District Judge (R. 1, 39), who filed an opinion on December 5, 1942 (R. 19-23) and findings of fact and conclusions of law on April 20, 1943 (R. 24-27), holding that respondent herein (libellant below) failed to sustain its burden of proving that petitioner's shipment in fact exceeded 4 pounds per board foot when loaded on the ship at Jacksonville, and dismissing the libel on the merits (R. 23, 27).

The District Court's opinion is reported in 48 F. Supp. 402.

The final decree of the District Court dismissing the libel was entered April 20, 1943, from which date respondent herein had three months in which to appeal to the Circuit Court of Appeals for the Fifth Circuit, under the

provisions of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; U. S. Code, Ti. 28, §230, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

On July 12, 1943 respondent filed in the office of the Clerk of the District Court a notice of appeal, served on petitioner's counsel July 6 (R. 2, 30). On July 12 respondent's counsel also consulted with District Judge Lovett concerning the amount for which an appeal bond for costs should be furnished, which Judge Lovett fixed at $250. Respondent made no request for an allowance of appeal or other action by the Court during the three months' period which expired July 20, 1943 (R. 112, 113, 118). The appeal bond, executed July 16, 1943 (R. 38) was not filed until July 21, at which time respondent also filed assignment of errors (R. 2, 33, 37, 118).

On August 12, 1943 respondent's counsel filed a petition for allowance of appeal executed August 6, 1943, which Judge Lovett allowed on August 13, 1943 (R. 31-33, 118). On August 30, 1943, Judge Lovett signed an order allowing the appeal nunc pro tunc as of July 12, 1943, in which he recited that the record contained no allowance of appeal prior to the order of allowance based on the petition therefor filed August 12, 1943, which, however, was subsequent to the expiration of the "ninety day period" (sic) following the date of the final decree; that the Judge, during the "said ninety day period" learned of appellant's intention to appeal and "undoubtedly would have allowed the appeal if and when so requested" (R. 112, 113).

Petitioner herein moved the Circuit Court of Appeals for the Fifth Circuit to dismiss the appeal on the ground that application therefor was not duly made within three months after the entry of the decree appealed from, as required by the statute and, among other authorities, by

the decision of this Court in *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174.

On March 1, 1944 the Circuit Court of Appeals for the Fifth Circuit heard argument on the motion to dismiss the appeal and on the merits. On April 5, 1944 it rendered an opinion (R. 115-121) denying the motion to dismiss the appeal and reversing the decree of the District Court on the merits with instructions to remand for further and not inconsistent proceedings (R. 121).

The opinion of the Circuit Court of Appeals is reported in 141 F. (2d) 652.

2. The Facts

The substantially uncontradicted facts are as follows:

The contract of shipment dated November 13, 1940, as corrected for a typographical error by stipulation of counsel at the trial (R. 24, 39), provided as follows:

> "Engaged for account of Georgia Hardwood Lumber Company with Compania de Navegacion Transmar, S.S. *Panama* for shipment from Jacksonville to Alexandria, Egypt by steamer Pan. S.S. *Kotor* scheduled to load 11/25/40 750,000 Bd. Ft. Pine Timbers Not Exceeding 4 Pounds per Bd. Ft. at $70.00 per 1000 Bd. Ft. On And/Or Under Deck, Ship's Option" (R. 19, 101, 102).

The *Kotor* arrived at Jacksonville November 26, 1940, began loading cargo the next day and completed loading all of petitioner's and other cargo on December 4, 1940. Substantially all of petitioner's shipment of timbers was awaiting the ship's arrival at Jacksonville, to which point they had been transported by railroad from interior points of origin on open flat cars, exposed to sun and circulation of air. The shipment consisted chiefly of "water-seasoned" sawn pine timbers, 38 carloads coming from Century, Florida, and 3 from Brewton, Alabama, where they were loaded directly from water storage onto the flat cars, thence moved to Pensacola, where they were

weighed by the railroads for the purpose of assessing railroad charges. One carload from Gulf Hammock was similarly weighed at Dunnellon, Florida. The railroad weights, taken while the timbers were still wet from their long immersion in water, showed an average of about 4.75 pounds per board foot. After such weighing, the timbers, stowed on the open flat cars and abundantly ventilated by separation strips and butts spaced apart, were moved to Jacksonville, a distance of about 400 miles from Pensacola and 100 miles from Dunnellon.* A maximum period of at least 16 days and an average of at least 10 days elapsed between the time the first car was weighed until the last car was loaded on the *Kotor* at Jacksonville (R. 19, 24, 117).**

The railroad way bills coming to the attention of the ship's agent at Jacksonville several days before the *Kotor* arrived, he complained to petitioner's representative that they showed the timbers to exceed the weight of 4 pounds per board foot specified in the contract. Petitioner's representative reminded him of a previous conference in which he had been informed that the timbers had been water-seasoned and would dry out and lose weight in transit to Jacksonville, so that they would not exceed 4 pounds per foot when loaded on the vessel (R. 95). The ship's agent suggested that "sample" cars be weighed, which petitioner's representative declined because of the impos-

* The District Court, on uncontradicted evidence (R. 61), found that the railroad transit from Pensacola to Jacksonville was approximately 400 miles (R. 24). The Circuit Court of Appeals, apparently deducting the distance from Century and Brewton to Pensacola, erroneously stated that the distance from Pensacola to Jacksonville was 340 miles (R. 116), thereby substantially diminishing the length of railroad transit during which the timbers were subjected to ventilation, dehydration and loss of weight.

** There is no evidence to support the Circuit Court of Appeals' statement that "all of them (railroad cars) were discharged by Dec. 1st" (R. 116). The uncontradicted evidence was that direct loading from the cars onto the *Kotor* was completed December 4 (R. 97). The erroneous date assumed by the Circuit Court of Appeals diminished the period of evaporation and loss of weight by three days.

sibility of picking representative samples, but suggested that all the cars be weighed. The ship's agent declined to do this and failed to have any of the timbers weighed at Jacksonville, although, as found by the District Judge (R. 22, 25), this would have been a simple matter involving trifling expense and no delay (R. 96). The entire shipment of 750,000 board feet plus an additional quantity shipped by petitioner under a second booking (which petitioner declined to guarantee would weigh less than 5 pounds per board foot because it was "green", not water-stored) (R. 88, 93, 100), was thereafter loaded direct from the railroad cars onto the *Kotor* (R. 24, 97). The vessel also loaded timber of another shipper (R. 97). Petitioner paid the full ocean freight at $70 per 1,000 board feet in accordance with the contract (R. 20-21, 26, 97). Respondent carrier then brought this action against petitioner, the shipper, for "lost freights on a corresponding amount of tonnage" claimed by reason of the alleged excess weight of petitioner's shipment (R. 3).

At the trial before District Judge Lovett, respondent relied solely upon the railroad weights taken while the timbers were still soaked with water, near the interior points of origin, as sufficient proof that petitioner's shipment exceeded the stipulated weight of 4 pounds per board foot when loaded on the vessel. It failed to offer any proof whatever that the asserted overweight caused it to be deprived of any other cargo or to sustain any damages whatever.

The uncontradicted testimony was to the effect that the weight of pine timber is largely affected by the weight of sap or of moisture content. Upon long immersion of green timber the water penetrates the wood and dissolves and replaces the sap with little if any increase in weight (R. 55, 76, 79, 84). When the timber is taken from the water the water evaporates and the timber loses weight rapidly —much faster than does green timber (R. 55, 59, 76, 85). The process of evaporation and loss of weight is acceler-

ated by ventilation and the circulation of air (R. 52, 83, 118). Experts testified without contradiction that water-seasoned timbers, under the conditions of open stowage on railroad flat cars, ventilation and long transit, as occurred here, would lose considerable moisture and weight prior to loading on the vessel at Jacksonville. Although their estimates of the probable loss of weight varied because the precise conditions at all times during the transit were not known, they agreed that the timber lost substantial weight after weighing on the railroad scales at Pensacola, so that they probably did not weigh more than 4 pounds per foot when loaded on the *Kotor* (R. 60, 65, 78, 83).

3. The Decision of the District Court

The District Court held that the burden of proof rested upon libellant (respondent herein) to establish that the weight of the shipment exceeded the maximum stipulated in the contract at the time of loading on the vessel. It further held that libellant failed to sustain its burden of proof by the evidence of the railroad weights taken shortly after the timbers were removed from water-storage, because those weights did not remain constant, inasmuch as the timbers were thereafter subjected to conditions which tended to cause substantial evaporation and loss of weight; furthermore, that it failed to establish the actual weight at shipside by having the shipment weighed on the track scales at Jacksonville, which would have been a simple matter involving slight expense and no delay. Accordingly the District Court found it unnecessary to consider the defense that libellant failed to make any showing of damages whatever, and dismissed the libel on the merits (R. 21-24, 26-27).

4. The Appeal Proceedings Below

From the final decree entered April 20, 1943 (R. 2, 28) respondent herein took a purported appeal to the Circuit

Court of Appeals for the Fifth Circuit, in connection with which the following occurred:

1943

Apr. 20 Final decree dismissing libel entered (R. 2, 28, 118).

July 6 Notice of appeal served on petitioner's proctors (R. 118).

July 12 Notice of appeal filed with Clerk of District Court. No application for allowance of appeal or order allowing appeal (R. 2, 20).

July 12 Proctors for respondent consulted the District Judge on the amount of an appeal bond, fixed at $250 (R. 118).

July 16 Appeal bond executed (R. 38, 118).

July 20 Period for allowance of appeal expired (three months from April 20).

July 21 Appeal bond and assignment of errors filed with Clerk of District Court (R. 2, 33, 37, 118).

Aug. 6 Petition for allowance of appeal verified (R. 33, 118).

Aug. 12 Petition for allowance of appeal filed (R. 112, 118).

Aug. 13 Appeal allowed (R. 32, 118).

Aug. 14 Praecipe filed (R. 2).

Aug. 17 Citation dated August 16 issued (R. 2).

Aug. 30 Order of the District Judge signed and filed, allowing appeal nunc pro tunc as of July 12 (R. 112, 113, 118).

5. The Decision of the Circuit Court of Appeals

The Circuit Court of Appeals, denying petitioner's motion to dismiss the appeal made on the ground that respondent failed to make due application for allowance of the appeal within three months from the entry of the final decree, also reversed the District Court on the merits, and remanded the cause for further and not inconsistent proceedings (R. 121, 122).

In connection with the procedural question the Circuit Court of Appeals held:

(a) "The point as to our jurisdiction is quite a serious one." As the Federal Rules of Civil Procedure, by the express terms of Rule 81(a)(1) do not apply in admiralty, appellate jurisdiction in admiralty depends upon "substantial reliance" on 28 U. S. C. A., §230 (R. 119).

(b) Appellant (respondent herein) "did not within the ninety days" (sic) from the entry of the decree "formally apply for and obtain the allowance of an appeal" (R. 118). Nevertheless, if informal application is timely made, actual allowance may come later (R. 120).

(c) Notwithstanding the decision of this Court in *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174 (which held that the right of appeal in admiralty is conditioned upon compliance with the requirements of U. S. Code, Ti. 28, §230, supra, and that even a rule of the Circuit Court of Appeals requiring only the filing of a notice of appeal cannot contravene the statute), nevertheless appellant's acts in merely filing a notice of appeal and consulting with the District Court concerning the amount of a prospective bond for costs, subsequently executed, amounted to a "timely application to appeal" which was perfected by actual allowance after the period had expired (R. 121).

(d) Indicating considerable doubt and hesitancy that its decision squared with this Court's opinion in *Alaska Packers Association* v. *Pillsbury*, which, it admitted, was "disturbing" the Circuit Court of Appeals, said:

> "It is quite plain that it (appellant) was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the Alaska case, which, though not directly in point, is disturbing, we should not hesitate to hold: that what appellant did amounted to a

timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established" (R. 121).

(c) Notwithstanding that appellant failed to request any action by the Court for allowance of appeal, approval of an appeal bond, or otherwise, during the statutory period, nevertheless *R. F. C.* v. *Prudence Group*, 311 U. S. 579, and other cases "warrant our taking jurisdiction and denying the motion to dismiss" because otherwise would be "to deprive a litigant of his right to appeal merely because, though it plainly appeared that he was intending to and thought he was doing what was necessary to, appeal, he took his steps informally instead of formally" (R. 120, 121).

On the merits the Circuit Court of Appeals held: "The evidence of the rail weights was sufficient unless overthrown to entitle libellant to judgment" (R. 121) notwithstanding that the railroad weights were ascertained by the railroads near interior points of origin before the timbers dried out and lost weight in transit to Jacksonville, and the uncontradicted evidence showed that a substantial loss of weight occurred prior to loading on the vessel.

Conceding that the opinion testimony that the timbers would dry and had to some extent dried "should not be wholly rejected" nevertheless the earlier rail weights established a factual condition which continued unless the evidence thereof was "entirely overthrown", thus in effect shifting to petitioner the burden of proving the ultimate fact of the weight of the shipment when loaded on the vessel (R. 121).

As the Court devoted a scant half page, without citation of authority, to support its reasons for reversing the District Court's careful opinion, findings of fact and conclusions of law on the merits, it is impossible to ascertain the grounds for its decision without reference to its statement of the case and review of the facts, viz.:

(a) Reciting that the suit was "for freight money * * * at $35 per ton" (R. 115, 116), the Court evidently considered that a contract for ocean shipment of a quantity of cargo on a measurement basis at a measurement rate, with a collateral undertaking as to weight, constitutes a contract to ship and pay freight on a weight basis.

(b) Stating that the "positive rail weights (were) obtained and furnished by the respondent" (petitioner) (R. 121) and that "when * * * the timbers were loaded aboard the ship the (railroad) bills of lading were delivered to libellant" (R. 117), the Court, inventing a fact not found in the record, apparently considered that petitioner offered to the carrier the railroad bills of lading and their recital of previously existing weights as a representation of the weights of the timbers at shipside.*

B. The Basis of the Jurisdiction of This Court

The statutory provision believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C., §347(a).

C. The Questions Presented

1. May an appeal from a final decree in admiralty be taken without making an application for allowance thereof within three months from the entry of the decree appealed from?

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*The sales invoices (Ex. P-6) and railroad freight bills (Ex. P-2) show that the timbers were shipped by the suppliers at Century, Brewton, etc., to petitioner in care of respondent's agent at Jacksonville for export, whereby he acquired knowledge of the railroad weights at interior points. Before the ship arrived petitioner's representative informed him that these rail weights would not accurately reflect the weights on completion of the rail transit (R. 95).

If so, the requirements prescribed by Congress in 28 U. S. C., §230, are inapplicable to appeals in admiralty, and the decisions of this Court in *Alaska Packers Association* v. *Pillsbury*, supra, and *Barrel* v. *Transportation Co.*, 3 Wall. 424, are overruled.

2. Does the mere filing of a notice of appeal in admiralty and an inquiry of the District Judge concerning the amount for which a bond for appeal costs should be issued, but without request for allowance of appeal or for any action by the Judge within three months from the entry of the decree, constitute a "duly made" application for "allowance" of an appeal in admiralty?

If so, litigants, and not Congress, control the procedure for taking appeals in admiralty; and the decisions of this Court in *Alaska Packers Association* v. *Pillsbury* and *McCrone* v. *United States*, 307 U. S. 61, and the decisions of the Circuit Courts of Appeal of many Circuits construing the statute, no longer apply.

3. Under a contract to ship cargo on a measurement basis, both as to quantity and rate of ocean freight, which is completely performed, can the carrier recover extra compensation based on an undertaking as to the weight of the cargo without proving (a) the weight when loaded on the vessel and (b) the damages sustained thereby?

If so, then shipments on the basis of measurement become shipments on the basis of weight at the option of the carrier, and the law of contract warranties is thrown into confusion.

4. Where a factual condition is sought to be proved by circumstantial evidence based upon an inference of the continuous condition of a previous state, does the burden shift to the opponent, not merely of going forward with evidence to show a substantial change in the previous condition, but also to prove the quantum of such change?

If so, then the proponent of an ultimate fact discharges his burden of proof by resort to speculative and illogical inferences, and the burden of proving the ultimate fact shifts to the opponent, contrary to established principles of law.

D. The Reasons Relied On for the Allowance of the Writ

It is respectfully submitted that this Court should take up this case on certiorari, set aside the decision of the Circuit Court of Appeals, and restore the decision and decree of the District Court on the following grounds:

1. This case involves an important procedural question involving appeals in admiralty which may be taken only upon compliance with the requirements prescribed by Congress in U. S. Code, Ti. 28, §230.

The courts have heretofore consistently held that the statute is "mandatory and jurisdictional", and that an application for allowance of an appeal must be duly made within three months from the entry of the decree.* In holding that an appeal in admiralty is validly taken without any request to the Court for an allowance of appeal within three months from the entry of the decree appealed from, the Circuit Court of Appeals has nullified the statute and has decided an important question of procedure which is in direct conflict with *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, and *Barrel* v. *Transportation Co.*, 3 Wall. 424; also with *McCrone* v. *United States*, 307 U. S. 61.

It is also in direct conflict with the decisions of the Circuit Courts of Appeals in the following cases, among others: *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750; *Camden Iron Works Co.* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846; *United States* v. *New National Coal & Mining Co.*,

* Federal Rules of Civil Procedure, permitting an appeal by filing a notice of appeal, do not apply to proceedings in admiralty. Rule 81(a)(1).

C. C. A. 7, 72 F. (2d) 168; *Share* v. *United States*, C. C. A. 8th, 50 F. (2d) 669; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61.

2. The Circuit Court of Appeals has wrongly decided an important question of mercantile law in such a way as to misconstrue and distort a clearly expressed contract for shipment on a measurement basis into a shipment on a weight basis at the carrier's option; and has ignored the legal effect of a collateral undertaking of weight as being at most a warranty, requiring the carrier to prove both breach and damages therefrom, contrary to established principles of law and the authorities, including *Excelsior Coal Co.* v. *Gildersleeve*, C. C. A. 2, 160 Fed. 47.

3. The Circuit Court of Appeals has wrongly decided an important question of the laws of evidence, presumptions and the burden of proof, contrary to well-recognized principles, and particularly to those stated by this Court in *N. Y. Life Ins. Co.* v. *Gamer*, 303 U. S. 161, and *Del Vecchio* v. *Bowers*, 296 U. S. 280, 286, and to the decisions of the courts of many States including *Cage* v. *Amsler* (Court of Civil Appeals, Texas), 217 S. W. 1094, *McLaughlin* v. *Terrell Bros.* (Court of Civil Appeals, Texas), 179 S. W. 932; *Jensen* v. *Logan City*, Utah, 57 Pac. (2d) 708; *Cleveland C. C. & St. L. Ry. Co.* v. *Starks*, Indiana, 106 N. E. 646, and *Bludworth* v. *Bray*, 59 Fla. 437, 52 So. 957.

4. All the questions herein presented are of great importance to courts of admiralty and practitioners of admiralty law, and to shippers, carriers and all others concerned in commerce. The decision of the Circuit Court of Appeals on all of these questions appears to be in conflict with an Act of Congress as construed by this Court, the weight of authority and established principles of admiralty procedure and of contract law.

E. Accompanying Documents

A certified copy of the transcript of the record of the proceedings of the District Court and Circuit Court of Appeals is presented herewith, together with copy of order of the Circuit Court of Appeals dated May 21, 1944, granting a further stay of its mandate for thirty days.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court on a day to be designated for its review and determination, a full and complete transcript of all proceedings in said Circuit Court of Appeals in the case entitled in that Court: Compania de Navegacion Transmar S.A., owner of S.S. *Kotor,* libellant-appellant, against Georgia Hardwood Lumber Company, respondent-appellee, No. 10796; that the appeal taken to said Circuit Court of Appeals be dismissed; that the decision of the said Circuit Court of Appeals rendered on the 5th day of April, 1944, be reversed and the decree of the District Court be reinstated by this Honorable Court; and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray, etc.

Dated, New York, June 16, 1944.

GEORGIA HARDWOOD LUMBER COMPANY
Petitioner.

By JOHN TILNEY CARPENTER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,
Respondent
(Libellant-Appellant below).

BRIEF FOR PETITIONER

The Opinions Below

The opinion of the District Court is officially reported in 48 F. Supp. 402. The opinion, findings of fact and conclusions of law are printed in the Record (R. 19-27). The opinion of the Circuit Court of Appeals, filed April 5, 1944, is officially reported in 141 F. (2d) 652, and printed at pages 115-121 of the Record.

The Jurisdiction of This Court

This is a suit in admiralty by respondent against petitioner for the recovery of $9,304 alleged "lost freights" claimed to have been sustained by respondent carrier as the

result of alleged excess weight of a cargo under a contract for shipment of 750,000 board feet of pine timbers "not exceeding 4 pounds per board foot at $70.00 per 1000 board foot on and/or under deck ship's option" from Jacksonville, Florida, to Alexandria, Egypt.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. Code, Ti. 28, §347(a).

The Facts

The facts are stated in the petition and will not be repeated here.

POINT I

The Circuit Court of Appeals has wrongly decided an important question of statutory procedure in respect of appeals in admiralty, in conflict with the terms of the statute and with decisions of this Court and of other Circuit Courts of Appeal.

Prior to 1938 all appeals in actions at law and in admiralty were governed by Section 8(c) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; 28 U. S. C. §230,* which provides:

* By the Act of June 19, 1934, c. 651, Sec. 1, 48 Stat. 1064, 28 U. S. C. 723b, the Supreme Court was granted the power to prescribe general rules for the practice and procedure in civil actions at law. Rule 81(a)(1) of the Federal Rules of Civil Procedure expressly provides that those Rules do not apply to proceedings in admiralty. This Court has not altered the Admiralty Rules so as to permit an appeal to be taken to the Circuit Court of Appeals by merely filing a notice of appeal as permitted by the Rules of Civil Procedure, and the requirements for taking an appeal in admiralty continue to be governed by 28 U. S. C. §230. *The Fanny D.*, C. C. A. 5, 112 F. (2d) 347; *Blaske* v. *Dick*, C. C. A. 7, 126 F. (2d) 96. It is equally clear that the decisions of the courts construing 28 U. S. C. §230 before the promulgation of the Federal Rules of Civil Procedure remain applicable to the construction of that statute in respect of appeals in admiralty.

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

In holding that respondent's acts in merely filing a notice of appeal and conferring with the District Judge concerning the amount of a prospective appeal bond, without request for any action by the District Judge within the three months' period, "amounted to a timely application to appeal" herein (R. 121), the Circuit Court of Appeals has in effect nullified the statutory requirement that an *application for allowance* of an appeal in admiralty must be *duly made* within the three months' period.

The courts have repeatedly held that the requirements of the statute are "mandatory and jurisdictional", as the Circuit Court of Appeals itself has held; and cannot be avoided by consent, waiver, or even by order of the court: *Robertson* v. *Morganton Full Fashioned Hosiery Co.*, C. C. A. 4, 95 F. (2d) 780; *Osborn* v. *United States*, C. C. A. 4, 50 F. (2d) 712; *Morrow* v. *Wood*, C. C. A. 5, 126 F. (2d) 1021; *Vaughan* v. *American Insurance Co.*, C. C. A. 5, 15 F. (2d) 526; *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750; *Robie* v. *Hart, Schaffner & Marx*, C. C. A. 8, 40 F. (2d) 871; *Collins* v. *United States*, C. C. A. 8, 24 F. (2d) 823.

In *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, this Court unequivocally stated that an appeal in admiralty may not be validly taken by filing a notice of appeal unless accompanied by due application to the District Court for an allowance of the appeal, and that even a rule of the Circuit Court of Appeals cannot dispense with the statutory requirement of due application and allowance, saying:

> "The reasons for requiring that an appeal be duly applied for and allowed are that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be reexamined on appeal; and that appropriate security for costs may be taken where the appellant is not by law ex-

empted from giving such security. In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made. The reasons for thus conditioning the right of appeal have the same application to decrees in admiralty that they have to decrees in equity and judgments at law; and the act of 1925 includes one as much as another, for it says: 'No * * * appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made'" (p. 177).

It is perfectly clear that no application for an allowance of its appeal was made by respondent herein before the three months' period expired on July 20, 1943 (which the Circuit Court of Appeals described as "the ninety days", R. 119, 120), and, indeed, that neither respondent's counsel nor the District Judge thought either application or allowance was necessary. The recital in the District Court's nunc pro tunc order of August 30, 1943, that he would "undoubtedly have allowed the appeal *if and when so requested*" (R. 113) shows that no such request was made prior to the actual petition for allowance of appeal executed August 6, 1943, and allowed August 13, 1943 (R. 31, 33), long after the statutory period had expired. Concededly, the belated application and allowance, and the District Court's nunc pro tunc order of August 30, 1943 (R. 112, 113) were of no avail if the acts performed during the three months' period did not comply with the statutory requirements (R. 120); *Old Nick Williams Co.* v. *United States*, 215 U. S. 541; *Credit Co.* v. *Arkansas Central Railway*, 128 U. S. 258.

The Circuit Court of Appeals, however, saying that "the language of the opinion in the *Alaska* case, which, though not directly in point, is disturbing" (R. 120-121), held that the mere filing of a notice of appeal and discussion with the District Judge concerning the amount of an appeal bond

to be later obtained "amounted to a timely application to appeal", because respondent and the District Judge "thought it was effectively appealing" (R. 120). But the same could be said even more strongly in favor of the appellant's improper procedure in *Alaska Packers Association* v. *Pillsbury*, supra, where he complied with the rule of the Circuit Court of Appeals, and neither he nor that court thought that his right to appeal was, as this Court subsequently held, *conditioned* upon due application and allowance.

The decision of the Circuit Court of Appeals is directly contra to that of this Court in *McCrone* v. *United States*, 307 U. S. 61, holding that in filing a notice of appeal and obtaining the trial judge's signature to a bill of exceptions, the appellant failed to comply with the statutory requirement of application for allowance of his appeal. There, too, the appellant "thought" he was "effectively appealing".

The error into which the Circuit Court of Appeals fell was to extend a tolerance of informal procedure so as to dispense entirely with performance of an essential act which Congress has prescribed. *Cf. McCrone* v. *United States*, C. C. A. 9, 100 F. (2d) 322, 324, aff'd 307 U. S. 61. The exercise of the right to appeal is conditioned upon submission of the appeal to the Court for its action allowing the same, both by the express terms of the statute and by the authorities which have construed it. *Barrel* v. *Transportation Co.*, supra; *Alaska Packers Association* v. *Pillsbury*, supra; *McCrone* v. *United States*, supra; *Camden Iron Works* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846; *United States* v. *New National Coal & Mining Co.*, C. C. A. 7, 72 F. (2d) 168; *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61.

In *United States* v. *New National Coal & Mining Co.*, supra, the Circuit Court of Appeals for the Seventh Circuit said:

> "Appeal is granted to the losing party on condition that he complies with the terms of the law whereby it is

> authorized. * * * Merely declaring that he will appeal does not of itself amount to taking an appeal nor does the mere filing of a petition for appeal have that effect. The filing of the petition for appeal avails nothing unless within the statutory time allowed for taking the appeal it is brought to the attention of the judge for action thereon" (p. 168).

In *Share* v. *United States*, supra, counsel for appellant, within three months, served and filed a notice of appeal and, in conference with the District Judge, presented him an application for an allowance of the appeal but did not leave the papers with the Judge. In dismissing the appeal, the Circuit Court of Appeals for the Eighth Circuit said:

> "It is clear that for some reason the petition for appeal, accompanied by the assignment of errors, was not finally submitted to the trial judge for action at that time; nor is there any suggestion that counsel seeking the appeal, at the time of the Duluth interview, had done all that he was required to do in order to have the appeal allowed, and that the delay was due solely to inaction by the court" (p. 670).

In *Camden Iron Works* v. *City of Cincinnati*, supra, counsel, within the statutory time, withdrew his appeal papers from the Clerk's office and brought them to the attention of the District Judge in connection with efforts to settle the bill of exceptions. Dismissing the appeal, the Circuit Court of Appeals for the Sixth Circuit said:

> "But we are not satisfied that application was then and there made for an immediate or present allowance of writ of error * * * (p. 849).
>
> "We thus think that plaintiff in error has failed to show with requisite clearness that it did all within its power to procure the issuing of the writ within the statutory period" (p. 850).

The "application" for allowance required by the statute necessarily carries the element of request. *Osborn* v. *United States*, C. C. A. 4, 50 F. (2d) 712, 714; *Robie* v. *Hart, Schaffner & Marx*, C. C. A. 8, 40 F. (2d) 871, 872.

No request for allowance of appeal was made here. The District Judge was merely asked the amount for which an appeal bond should be later provided, and which was in fact not executed until several days later or filed until July 21, 1943, after the three months' period had expired (R. 37, 38).

In relying upon *R. F. C.* v. *Prudence Group*, 311 U. S. 579, as warranting its taking jurisdiction and denying the motion to dismiss the appeal (R. 121), the Circuit Court of Appeals apparently considered that this Court has established a general rule that a statutory requirement for allowance of an appeal may be disregarded, overlooking the exceptional circumstances of that case. There the Circuit Court of Appeals for the Second Circuit, where the case arose, had held in *London* v. *O'Dougherty*, 102 F. (2d) 524, that appeals from certain compensation orders in bankruptcy cases could be held as a matter of right. In reliance upon the permanency of that decision, the appellants filed notices of appeal from compensation orders without making application to the Circuit Court of Appeals for leave to appeal. Thereafter this Court, in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, held that appeals from such orders may be had at the discretion of the Circuit Court of Appeals. Misled by the decision of their own court in *London* v. *O'Dougherty*, the appellants were thus caught in a trap. This Court held that in view of the circumstances and the diligence of appellants in following the then established procedure, "it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London* v. *O'Dougherty*, supra" (p. 583). But this Court carefully pointed out that

> "The proper procedure for taking them (appeals) is by filing in the Circuit Court of Appeals, within the time prescribed in §25(a), applications for leave to appeal, not by filing notices of appeal in the District Court as was done here" (p. 581).

> "Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient" (p. 582).

Concurring, Mr. Justice Reed, Mr. Justice Roberts joining with him, stated:

> "Timely application to the circuit court of appeals for leave to appeal is a jurisdictional requirement, and • • • the practice followed in this case cannot be reduced to a mere procedural irregularity. • • • However, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London* v. *O'Dougherty*, 102 F. (2d) 524. In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires" (p. 583).

In the case at bar, no exceptional circumstances whatever were present, and respondent was not misled by any unsettled practice or conflict of authority. The decision of *Alaska Packers Association* v. *Pillsbury*, decided in 1936, stood as a clear and final pronouncement of the law that 28 U. S. C. §230 means what it says and that appeals in admiralty are invalid unless application is duly made to the Court for allowance of appeal within three months from the entry of the decree. The record is barren of any justification for failure to make such application to the District Judge who was available and whose nunc pro tunc order of August 30, 1943, shows he was not requested to allow an appeal (R. 113). The practice in the Second Circuit, where leading proctors for respondent principally practice (R. 112), is definitely established, not only by *Alaska Packers Association* v. *Pillsbury*, but by Rule XXXVIII of the Rules of the Circuit Court of Appeals for the Second Circuit which provides:

> "• • • An allowance of the appeal shall be obtained and filed with the notice."

The duty to apply for an allowance of appeal rests upon the appellant, not upon the Clerk of the Court. *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61; *Greyerbiehl* v. *Hughes Electric Co.*, C. C. A. 8, 294 Fed. 802, 804, cert. den. 264 U. S. 589; *Kentucky Coal Co.* v. *Howes*, C. C. A. 6, 153 Fed. 163; *Warner* v. *Texas & P. Ry. Co.*, C. C. A. 5, 54 Fed. 920.

It is respectfully submitted that in holding that respondent's acts in merely filing a notice of appeal and conferring with the District Judge concerning the amount of an appeal bond to be executed later, constituted due application for allowance of appeal, the Circuit Court of Appeals has construed 28 U. S. C. §230 contrary to its express terms and to established authority, and has in effect nullified it.

POINT II

In finding that petitioner breached its contract upon evidence of the weight of the timbers near interior points of origin regardless of the subsequent substantial loss of weight, the Circuit Court of Appeals erroneously held that the burden of proving the weight on shipment shifted from the proponent to the opponent thereof, contrary to established authority.

In holding that "The evidence of the rail weights was sufficient, unless overthrown to entitle libellant to judgment" (R. 121), the Circuit Court of Appeals misapprehended the nature of the proofs offered by libellant, respondent herein. Its statement that "The positive rail weights (were) obtained and furnished by the respondent (R. 121) (petitioner herein)" shows that the Circuit Court of Appeals considered that petitioner had proffered to respondent the rail weights at interior points of origin as some sort of a representation of the weights at shipside. This assumption not only finds no support anywhere in the record, but is disproved by the uncontradicted evidence that three days before the *Kotor* arrived at Jacksonville,

the ship's agent informed petitioner's representative that the way bills on the cars showed them to be in excess of the 4 pounds per foot (R. 95). All that petitioner did was to have the suppliers load the timbers on the cars from their water storage at Century, Brewton and Gulf Hammock, pay the freight charges as weighed and assessed by the railroads, and have the timbers shipped to Jacksonville. The rail weights were in fact obtained by the railroads, and came into the hands of the ship's agent only because the timbers were shipped to petitioner in his care (Pl. Exs. 2 and 6). They were admitted in evidence at the trial only because petitioner, in response to a demand for admission of the genuineness of the railroad freight bills (R. 12), and that the net weights referred to therein represented the true weight *at the time and place described in said railroad freight bills* (R. 12, 13) stated:

> "Respondent admits that the net weights stated in said railroad freight bills were the weights of the respective shipments of lumber, as ascertained by the respective railroads for the purpose of determining a basis for assessing railroad freight charges, at the dates when and places where the said freight bills show the weights were ascertained.
>
> "Respondent does not admit but on the contrary denies, that the weights stated in said railroad freight bills show the weights of the said lumber when loaded on the S.S. *Kotor*." (R. 18)

The railroad weights near points of interior origin had no probative force except by indulging in an inference that the weight of the timbers was continuous in its nature while abundantly ventilated in open stowage on railroad flat cars during the interval of about two weeks when traveling about 400 miles and awaiting loading on the ship. Petitioner, by uncontradicted testimony, established that the weight of the timbers was composed of the weight of the wood and of water which had penetrated the timbers during their long immersion in water storage, and that water-stored timbers dry out and lose weight rapidly when ex-

posed to the circulation of air, as occurred during and after the railroad transit (R. 51, 52, 65, 71, 72, 77, 78, 83, 85). Indeed, the Circuit Court of Appeals, while criticizing the opinion evidence concerning the extent of evaporation and loss of weight prior to loading on the ship at Jacksonville, said:

> "This does not mean that the opinion testimony that the timbers would dry and had to some extent dried must be wholly rejected" (R. 121).

Thus respondent necessarily based its claim that the timbers were overweight when loaded on the vessel at Jacksonville upon an inference that the timbers had not undergone such a substantial loss of weight after they were weighed on the railroads as to result in a hypothetical weight of more than 4 pounds per foot when loaded on the ship. In holding that the burden rested upon petitioner to "entirely overthrow" the railroad weights, the Circuit Court of Appeals in effect held that the burden of proving the ultimate fact of weight shifted from respondent herein, the proponent thereof, to petitioner. The Circuit Court of Appeals thereby violated a fundamental canon of law that the burden of proving a breach of warranty rests upon the party asserting it, *Aetna Insurance Co.* v. *Taylor*, C. C. A. 5, 86 F. (2d) 225, and that the burden of proving an ultimate fact never shifts. *Gilmore* v. *United States*, C. C. A. 5, 93 F. (2d) 774, cert. den. 304 U. S. 569; *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, C. C. A. 2, 114 F. (2d) 248, aff'd 314 U. S. 104.

It is elementary that a party suing for breach of warranty must prove (1) the warranty, (2) the breach, and (3) the damages. *Excelsior Coal Co.* v. *Gildersleeve*, C. C. A. 2, 160 Fed. 47. In the present case the Circuit Court of Appeals has held that the party against whom a breach of warranty is asserted, must prove that it has not committed a breach.

Where an ultimate fact is sought to be proved on the basis of an inference of the continuance of a known con-

dition, the proponent obviously must establish that the inference is logically correct. An inference of a continuous state may arise in respect of a material thing when its nature is continuous. But where the nature of the object is such as likely to undergo a substantial change, no inference can arise that the previous condition remains constant. As the District Judge well put it, "Blocks of ice and blocks of granite weighing the same when the sun shines on them hot do not last equally as long" (R. 21).

In *Jensen* v. *Logan City*, Utah, 1936, 57 Pac. (2d) 708, 717, the general rule is well stated as follows:

> "Where the situation has inherent in it the likelihood of a change of state or the circumstances are such as to present opportunities for either natural forces or the intervention of persons or animals to cause a change in the situation, the testimony of a state presumed to continue must be fairly near the time of the event it is presumed to continue to and the more volatile the situation the nearer to the event must the observation be in order to become probative."

In *Cleveland, C. C. & St. L. Ry. Co.* v. *Starks*, Indiana, 1914, 106 N. E. 646, 651, the Court said:

> "In the process of proof by inference, there must first be established a fact or collection of circumstantial facts, bearing some relation to the fact to be proven. The court determines, as matter of law, whether or not any such relation may probably exist, and the jury then ascertains the relation, if any, by recourse to inferences. If the existence of such relation does not rise above the realm of the merely conjectural or speculative into that of the reasonably probable, indulging in inferences is not permissible, since, from such a situation, no inference could be drawn."

Wigmore on Evidence, 3d Ed., Vol. 2, Sec. 437, states:

> "When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior exist-*

ence of it is in human experience some indication of its probable persistence or continuance *at a later period.*

"The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap-bubble was in existence half an hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence today will vary according to the nature of the tree and the conditions of life in the region."

Accordingly, where the weight of articles is susceptible of undergoing a change between the time of shipment and the time of delivery, evidence of the weight at time of shipment is inadmissible to prove the weight at destination. *Cage* v. *Amsler*, Civ. App. Texas, 1919, 217 S. W. 1094, where the Court said:

"In these circumstances, the sole question being the weight at Houston, it was immaterial how many pounds were put in the car up at Howth, and evidence that any particular number of pounds were shipped from there would not tend to prove that the same quantity were delivered in Houston so many days later, especially in the absence of any showing that the shipment in the meantime remained intact. *Richard Cocke & Co.* v. *Big Muddy Coal & Iron Co.*, 155 S. W. 1019; *McLaughlin* v. *Terrell Bros.*, 179 S. W. 932."

To the same effect are *Hawkins* v. *Byrn*, Sup. Ct., Tenn., 1924, 261 S. W. 980; *Bludworth* v. *Bray*, 1910, 59 Fla. 437, 52 So. 957; *Lehigh Zinc & Iron Co., Ltd.* v. *Trotter*, 1887, 42 N. J. Eq. 661, 9 Atl. 694.

The only legal effect of a preliminary inference that the timbers retained their moisture content and that therefore

the previous rail weights remained continuous up to the time of loading on the vessel at Jacksonville, was to cast upon petitioner the duty of producing *some* evidence to the contrary. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 43. Petitioner fulfilled that duty by evidence that the weight of the timbers was largely affected by the amount of moisture which had been absorbed in water storage but which substantially evaporated thereafter. Thus any preliminary inference that the weight of the timbers at Jacksonville was the same as the weight when ascertained by the railroads at interior points, vanished upon the introduction of this opposing evidence. *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 643. A "presumption" of fact, or inference, is not evidence, and ceases upon the introduction of substantial evidence to the contrary. *N. Y. Life Ins. Co.* v. *Gamer*, 303 U. S. 161; *Wigmore Evidence*, 3d Ed., Vol. 6, Sec. 2491.

If the weight of a quantity of ice delivered at a certain time and place were in issue, the party having the burden of proving such weight could manifestly not prevail upon proof of what the ice weighed when put into an open wagon the day before in hot summer weather. For no reasonable inference would arise that the weight of the ice remained constant, and it is inconceivable that a court would cast upon the opponent the burden of proving how much the ice melted in the meantime. Yet that is precisely the illogical principle which the Circuit Court of Appeals has established in the case at bar.

Moreover, the Circuit Court of Appeals failed to mention, and apparently completely overlooked, the fact that it was entirely unnecessary (except for respondent's own choice) to rely upon surmise and conjecture as to what the weight of petitioner's shipment amounted to when loaded on the vessel. Petitioner's representative was willing that the entire shipment should be weighed on the track scales at Jacksonville, but respondent's agent declined with the excuse that this would cause too much delay in loading the

ship, although the *Kotor* did not arrive at Jacksonville until three days and did not complete loading until eleven days later (R. 96, 97). As the District Court correctly held:

> "In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of the weighing" (citing *Coulthurst* v. *Sweet* [1866], L. R. 1 C. P., 649, cited in Scrutton on Charter Parties, 14th Ed., p. 419) (R. 22).

Not only did respondent fail to obtain the best and easily available evidence by the simple and inexpensive method of having the timbers weighed on the cars at Jacksonville, but without excuse it failed even to call the ship's agent as a witness.

The opinion of the Circuit Court of Appeals fails to lay down any standard for the guidance of the District Court in further proceedings herein. Its statements that "the evidence of the rail weights was sufficient unless overthrown to entitle libellant to judgment" (R. 121), but that "the opinion testimony that the timbers would dry and had to some extent dried" need not be "wholly rejected" (R. 121), leave the basic question of the actual weight when loaded on the *Kotor* in the same realm of speculation and conjecture where, because of respondent's refusal to ascertain the facts by weighing the timbers at Jacksonville, it has remained throughout. Obviously, the burden of proving a material fact is not sustained by reliance upon surmise or conjecture, as the District Court correctly held (R. 27).

POINT III

The Circuit Court of Appeals misconstrued a contract for ocean shipment of cargo on the basis of measurement with a collateral warranty of weight, as being the same as a contract for shipment on the basis of weight. Not only has it cast upon the shipper the burden of disproving the carrier's assertion of overweight based upon an insupportable inference of the continuous nature of a previous condition, but it has held that a shipper who has paid full ocean freight is subjected to extra payment without proof of any damages resulting from breach of warranty, contrary to established principles of law.

The Circuit Court of Appeals misapprehended the nature of the shipping contract, for its recital of the case shows that the Court considered the contract as requiring shipment by petitioner of timbers at $35 per ton ocean freight (R. 115, 116), whereas the contract itself clearly shows that it called for shipment of "750,000 boat feet pine timbers not exceeding 4 pounds per board foot at $70.00 per 1000 board feet" (R. 24, 39, 102).

Thus the Circuit Court of Appeals has in effect held that a contract for ocean carriage, to be shipped and paid for on a measurement basis, with a collateral warranty of weight, is the same as shipment on a weight basis. If this be true, then freight classifications and tariffs of carriers generally will be thrown into confusion, and the law of contract warranties will have to be substantially revised. For hitherto it has been well established that an undertaking that goods possess certain qualities amounts to no more than a warranty, *Albany & Rensselaer Co.* v. *Lundberg*, 121 U. S. 451; and that the party suing for breach of warranty not only has the burden of proving such breach, *Aetna Ins. Co.* v. *Taylor*, supra, but of proving the dam-

ages, *Excelsior Coal Co.* v. *Gildersleeve*, C. C. A. 2, 160 Fed. 47.

A court of admiralty will not enter even an interlocutory decree unless the libellant establishes his right to recover some damage. Mere nominal claims will not be entertained. *In re Cal. Nav. & Imp. Co.*, 110 Fed. 670, 677; *Munson* v. *Straits of Dover S.S. Co.*, 99 Fed. 787, 792, aff'd C. C. A. 2, 102 Fed. 926; *Herbst* v. *The Asiatic Prince*, 97 Fed. 343, aff'd C. C. A. 2, 108 Fed. 287, cert. den. 183 U. S. 697; *Barnet* v. *Luther*, 2 Fed. Cas. 1025.

Nevertheless, the Circuit Court of Appeals, without even mentioning this defense (which the District Court found unnecessary to consider because it dismissed the libel for respondent's failure to sustain the burden of proving excess weight when loaded on the ship) (R. 23), reversed the decree of the District Court and remanded it for "further and not inconsistent proceedings" (R. 121, 122). The record is barren of an iota of evidence that respondent "lost freights on a corresponding amount of tonnage" as its libel (R. 3) alleged, or even to establish a prima facie case showing any damages whatever. No proof was offered that respondent had other cargo available and was prevented from loading it by reason of the asserted diminution of the vessel's deadweight carrying capacity resulting from any alleged overweight of petitioner's shipment. On the contrary, the record shows that the *Kotor* loaded an additional quantity of about 55,000 feet shipped by petitioner under a second booking which was made without any guaranty that the weight would be less than 5 pounds per foot (R. 88, 89), such timbers being "green" (not water-stored) and all that petitioner could supply at short notice (R. 89, 92, 93, 96, 100). Moreover the *Kotor* loaded another shipment of timbers belonging to someone else (R. 97). The record contains no evidence that any other available cargo was shut out, or that respondent, who concededly was paid full freight at the contract rate of $70 per 1,000 board feet measurement (R. 26, 97) sustained any damages whatever.

It is respectfully submitted that the errors which the Circuit Court of Appeals committed in misconstruing the contract herein and the law applicable thereto, warrants review by this Honorable Court.

LAST POINT

The prayer of the petitioner should be granted.

Your petitioner respectfully submits that the final determination by this Court of the questions of law involved in this case is of the utmost importance to the courts and practitioners of admiralty, in respect of the statutory requirements for appellate procedure, and to the rights of shippers and carriers and others engaged in commercial undertakings.

The decision of the Circuit Court of Appeals herein is not only contrary to the law, as interpreted by this and other courts in earlier decisions, but is contrary to sound principles of law both in respect of statutory construction and in respect of commercial law and the laws of evidence.

Unless the errors in that decision be corrected by this Court, the effect will be to nullify the statute governing appeals in admiralty, and to create regrettable confusion regarding questions of law which are of the utmost importance in contracts of affreightment.

Respectfully submitted,

JOHN TILNEY CARPENTER,
Counsel for Petitioner.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of S.S. KOTOR,
Respondent
(Libellant-Appellant below).

PETITIONER'S REPLY BRIEF

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IN THE

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No. 180

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Owner of S.S. KOTOR,
Respondent
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PETITIONER'S REPLY BRIEF

The respondent's brief in opposition to the petition for a writ of certiorari, received on September 8, 1944 (seventy-seven days after the petition, supporting brief and notice of filing were served upon respondent's counsel), calls for a short reply.

POINT I

The jurisdiction of the Circuit Court of Appeals.

Respondent's argument in support of the decision of the Circuit Court of Appeals makes much of the doctrine that where an application for allowance of appeal is made within three months from the entry of the judgment, actual allow-

ance by the Court may come later. But that is not the situation here.

Respondent's brief overlooks the manifest fact that in the present case no application for allowance of an appeal was actually made within the statutory three months' period. This failure is established beyond doubt by (1) the recital in the District Judge's nunc pro tunc order of August 30, 1943 (R. 112, 113) that the Judge learned of appellant's intention to appeal, had not indicated any intention to disallow the same, "and undoubtedly would have allowed the appeal *if and when so requested*"*; (2) by respondent's actually making an application for allowance of appeal on August 14, 1943, twenty-five days after the three months' period had expired (R. 2, 32); (3) by petitioner's ultimate reliance upon a mere inquiry of the District Judge concerning the requisite amount of a cost bond (R. 118), which, subsequently obtained, was not submitted to the Judge for approval at all, and was not filed until July 21st, the day after the three months' period expired (R. 37, 119).

Respondent's argument that an appeal seasonably applied for cannot be frustrated by delay on the part of the Court, and the decisions supporting that doctrine, are accordingly beside the point.

On the other hand respondent's brief makes no effort to overcome the decision of *McCrone* v. *United States*, 307 U. S. 61, in which this Court, citing *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, held that filing a notice of appeal and *having a bill of exceptions signed by the Court* within the three months' period was not a sufficient application for allowance of an appeal, saying:

> "The controlling statute required *application for allowance* of a civil appeal within three months after judgment from which appeal was sought" (p. 65).

* Emphasis supplied.

Respondent's brief also makes no effort to refute the established doctrine stated in *United States* v. *New National Coal and Mining Co.*, C. C. A. 7, 72 F. (2d) 168,* *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669, *Camden Iron Works* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846, and other decisions cited at page 22 of petitioner's brief herein, that the application required by the statute must be a request for an immediate and present action by the Court to allow the appeal. No such application was made by respondent, as the record clearly shows.

If these decisions are no longer the law, this Court, and this Court only, should so determine.

Respondent's citation at pages 10 and 11 of its brief, of the recent decision in *Miller* v. *Tietjen & Lang No. 2*, C. C. A. 3rd, 1944 A. M. C. 949, shows that the decision of the Circuit Court of Appeals in the present case has already become a precedent for the proposition that the mere filing of a notice of appeal in admiralty is a sufficient application for allowance thereof. Thus the decision of this Court in *Alaska Packers Association* v. *Pillsbury*, supra, is being whittled away by the lower courts to such an extent that it is becoming a dead letter, notwithstanding that this Court said, at page 177:

> " * * * The power of a court to make rules necessarily is confined to such as are consistent with controlling laws",

and Congress has not seen fit to relax the requirements of the statute, U. S. Code, Ti. 28, §230, in respect of appeals in admiralty.

The case is obviously one in which certiorari should be granted.

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*Inconsistent with, and apparently overruling, *United States* v. *Todar*, C. C. A. 7, 41 F. (2d) 146, cited at p. 7 of respondent's brief.

POINT II

The merits.

In order to support the decision of the Circuit Court of Appeals, respondent is forced to assert in its brief, page 12, that petitioner "furnished" to it the railroad weights (taken at interior points of origin), and to infer that this constituted a representation of the weight of the timbers when loaded on the vessel. This is factually wrong, and respondent does not and cannot point to anything in the record to substantiate its untenable position which also underlies the Circuit Court of Appeals' misunderstanding of this case.

The record shows without question that the railroad weights were ascertained by the railroads at inland points for the purpose of assessing railroad freight charges. The railroad freight bills containing these weights were admitted in evidence at the trial only by virtue of petitioner's admission that they were correct at the times and places described in such railroad freight bills, but not that they reflected the weights of the lumber when loaded on the vessel (R. 18). At most, the freight bills were only a representation by the *railroads to petitioner* that they correctly stated the weights of the timbers at the times and places of loading on the railroad cars at the beginning of the railroad transit, remote in time and distance from Jacksonville and before they were subjected to conditions which tended substantially to diminish their moisture and weight before they were loaded on the ship. The bills and their recital of weights later came into the hands of the ship's agent because the timbers were consigned in his care (Pl. Exs. 3 and 6). There is not a scintilla of evidence that petitioner ever "furnished" the railroad weights to respondent, or that petitioner in any way represented or indicated that they applied to the timbers when loaded on the vessel. On the contrary, the record shows without con-

tradiction that while the cars were awaiting the ship's arrival at Jacksonville, petitioner's representative told the ship's agent that the railroad weights did not show the actual weights on loading aboard the ship, and the ship's agent deliberately refused to ascertain the facts by the simple and inexpensive method of having the cars weighed (R. 95-97).

Overlooking these uncontradicted facts found by the District Judge (R. 19, 20, 22, 24, 25), the Circuit Court of Appeals held that petitioner failed to "entirely overthrow" the "positive rail weights obtained and furnished by the respondent" (petitioner herein) (R. 121). This fundamental misconception of the actual facts is reiterated in Point II of respondent's brief, and, together with the consequent departure from the cardinal principle that the burden of proving the facts relied upon as a breach of a shipper's warranty rests upon the carrier asserting such breach, requires review by this Court to correct the glaring injustice of the decision below.

Respondent's brief fails to mention or explain how the booking contract for "750,000 board feet pine timbers not exceeding 4 pounds per board foot at $70.00 per 1000 board feet" (R. 24, 39, 102) can be construed as a contract to ship at $35 per ton ocean freight, as the Circuit Court of Appeals erroneously considered (R. 115, 116); or on what principle of law a carrier may recover damages against a shipper for breach of a collateral warranty of the weight of the shipment without proving the quantum of overweight and the damages resulting therefrom. These questions are inherent in this case, and require review by this Court.

We do not believe that this case involves the Carriage of Goods by Sea Act, U. S. Code, Ti. 46, §1343. But respondent's reliance upon that Act, page 13 of its brief, if correct, furnishes additional need for interpretation by this Court on certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN TILNEY CARPENTER,
Counsel for Petitioner.

New York, September , 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
Owner of SS. KOTOR,
Respondent
(Libellant-Appellant below).

BRIEF FOR PETITIONER

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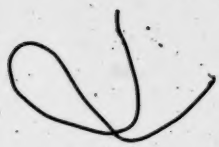

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,

Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
Owner of SS. KOTOR,

Respondent
(Libellant-Appellant below).

BRIEF FOR PETITIONER

I

Reports of the Opinions Below

The opinion of the Circuit Court of Appeals (R. 27) is reported in 141 F. (2d) 652.

The opinion of the District Court (R. 8) is reported in 48 F. Supp. 402.

II

Jurisdiction of This Court

1. This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted October 9, 1944, not yet officially reported, as follows:

> "The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the first and second questions presented by the petition for the writ and case transferred to the summary docket" (R. 41).

2. The statutory provision believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C., §347(a).

3. By the writ of certiorari petitioner, respondent in an action in admiralty, seeks to review a final judgment of the Circuit Court of Appeals for the Fifth Circuit (R. 34), which denied petitioner's motion to dismiss an appeal to that court and reversed a final decree of the United States District Court for the Southern District of Georgia, Augusta Division, dismissing the libel of respondent herein (R. 16, 17).

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4. The order for mandate of the Circuit Court of Appeals sought to be reviewed was entered on April 5, 1944 (R. 34). The petition for writ of certiorari was filed in this Court on June 20, 1944 (R. 42).

5. The statute involved herein is of the Act of February 13, 1925, c. 229, §8[c], 43 Stat. 940; 28 U. S. C., §230, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals

for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

6. The petition urged as reason for granting the writ that

(a) This case involves an important procedural question involving appeals in admiralty which may be taken only upon compliance with the requirements prescribed by Congress in 28 U. S. C., §230.

(b) In holding that an appeal in admiralty is validly taken without any request to the court for an allowance of appeal within three months from the entry of the decree appealed from, the Circuit Court of Appeals has in effect nullified the statute and has decided an important question of procedure in direct conflict with *Alaska Packers Assn.* v. *Pillsbury*, 301 U. S. 174; *Barrel* v. *Transportation Co.*, 3 Wall. 424, and *McCrone* v. *United States*, 307 U. S. 61.

(c) The decision of the Circuit Court of Appeals is also in direct conflict with the decisions of the Circuit Courts of Appeals in the following cases: *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750, cert. den. 280 U. S. 584; *Camden Iron Works Co.* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846; *United States* v. *New National Coal & Mining Co.*, C. C. A. 7, 72 F. (2d) 168; *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61.

(d) The questions presented are of great importance to courts of admiralty and practitioners of admiralty law, and the decision of the Circuit Court of Appeals appears to be in conflict with an Act of Congress as construed by this Court, the weight of authority and established principles of admiralty procedure.

III

Statement of the Case

Respondent herein, owner of the Panamanian steamship *Kotor*, brought this action in personam in admiralty against petitioner, a Georgia corporation, to recover damages for alleged breach of a contract for shipment by petitioner of a part cargo of pine timbers at Jacksonville, Florida, for carriage by respondent to Alexandria, Egypt (R. 2, 3). Although petitioner shipped the entire quantity and paid the full ocean freight at the measurement rate stated in the contract (R. 10, 15), respondent carrier, claiming that the timbers exceeded a guaranteed weight of four pounds per board foot, brought this action to recover an additional sum of $9,304 for "lost freights on a corresponding amount of tonnage" (R. 3).

The action was tried June 24, 1942 before Hon. Archibald B. Lovett, United States District Judge (R. 1, 16), who filed an opinion on December 5, 1942 (R. 8-13) and findings of fact and conclusions of law on April 20, 1943 (R. 13-16), holding that libellant (respondent herein) failed to sustain its burden of proving that petitioner's shipment in fact exceeded four pounds per board foot when loaded on the ship at Jacksonville, and accordingly dismissed the libel on the merits (R. 11, 13, 16).

The final decree of the District Court dismissing the libel was entered April 20, 1943 (R. 1, 16, 30), from which date respondent herein had three months in which to appeal under the provisions of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; U. S. Code, Tit. 28, §230, supra, p. 2.

On July 12, 1943 respondent filed in the office of the Clerk of the District Court a notice of appeal to the Circuit Court of Appeals for the Fifth Circuit, served on petitioner's counsel July 6 (R. 1, 17, 30). On July 12 respondent's counsel also consulted with District Judge Lovett concerning the amount for which an appeal bond for costs should be furnished, which he fixed at $250 (R. 30). Respondent made no request for an allowance of appeal or

other action by the Court or Judge during the three months' period which expired July 20, 1943 (R. 24, 30). The appeal bond was not filed until July 21, at which time respondent also filed assignment of errors (R. 1, 2, 19, 22, 30).

On August 12, 1943 respondent's counsel presented a petition for allowance of appeal to the District Judge, who allowed it on August 13, 1943 (R. 19, 24, 30). On August 30, 1943, the District Judge signed an order allowing the appeal nunc pro tunc as of July 12, 1943, in which he recited that the record contained no allowance of appeal prior to the order of allowance based on the petition therefor filed August 12, 1943, which, however, was subsequent to the expiration of the "ninety day period" (sic) following the date of the final decree; that the Judge, during the "said ninety day period" learned of appellant's intention to appeal and "undoubtedly would have allowed the appeal if and when so requested" (R. 2, 24-25).

Petitioner herein moved the Circuit Court of Appeals for the Fifth Circuit to dismiss the appeal on the ground that application therefor was not duly made within three months after the entry of the decree appealed from, as required by the statute (R. 30, 35).

On March 1, 1944 the Circuit Court of Appeals for the Fifth Circuit heard argument on the motion to dismiss the appeal and on the merits (R. 27). On April 5, 1944 it rendered an opinion (R. 27, 30-33) and judgment (R. 34) denying the motion to dismiss the appeal and reversing the decree of the District Court on the merits, with instructions to remand for further and not inconsistent proceedings. On June 20, 1944 the petition for a writ of certiorari herein was filed (R. 42).

The following is a summary of the occurrences below in connection with respondent's purported appeal:

1943

Apr. 20 Final decree dismissing libel entered (R. 1, 16, 30).

July 6 Notice of appeal served on petitioner's proctors (R. 30).

July 12 Notice of appeal filed with Clerk of District Court (R. 1, 17). No application for allowance of appeal or order allowing appeal.

July 12 Proctors for respondent consulted the District Judge on the amount of an appeal bond, fixed at $250 (R. 30).

July 16 Appeal bond executed (R. 30).

July 20 Period for application for allowance of appeal expired (three months from April 20).

July 21 Appeal bond and assignment of errors filed with Clerk of District Court (R. 1, 2, 18, 22, 30).

Aug. 6 Petition for allowance of appeal prepared (R. 30).

Aug. 12 Petition for allowance of appeal filed (R. 24, 30).

Aug. 13 Appeal allowed (19, 30).

Aug. 14 Praecipe filed (R. 2).

Aug. 17 Citation dated August 16 issued (R. 2, 25, 26)

Aug. 30 Order of the District Judge signed and filed, allowing appeal nunc pro tunc as of July 12 (R. 2, 24-25, 30).

IV

Opinion of the Circuit Court of Appeals

In connection with the procedural question now before this Court for review the Circuit Court of Appeals held:

(a) "The point as to our jurisdiction is quite a serious one." As the Federal Rules of Civil Procedure, by the express terms of Rule 81(a)(1) do not apply in admiralty, appellate jurisdiction in admiralty depends upon "substantial reliance" on 28 U. S. C. A., §230 (R. 30).

(b) Appellant (respondent herein) "did not within the ninety days" (sic) from the entry of the decree "formally apply for and obtain the allowance of an appeal" (R. 30). Nevertheless, if informal application is timely made, actual allowance may come later (R. 32).

(c) Respondent's acts in merely filing a notice of appeal and inquiring of the District Judge concerning the amount of a prospective bond for costs (subsequently executed) "amounted to a timely application to appeal" (R. 33).

(d) Indicating considerable doubt and hesitancy that its decision squared with this Court's opinion in *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, the court said:

> "It is quite plan [plain] that it was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the Alaska case, which, though not directly in point, is disturbing, we should not hesitate to hold: that what appellant did amounted to a timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established" (R. 33).

(e) Notwithstanding that respondent failed to request any action by any court or judge for allowance of appeal, approval of an appeal bond, or otherwise, during the statutory period, nevertheless *R. F. C.* v. *Prudence Group*, 311 U. S. 579, and other cases "warrant our taking jurisdiction and denying the motion to dismiss" because otherwise would be "to deprive a litigant of his right to appeal merely because, though it plainly appeared that he was intending to and thought he was doing what was necessary to, appeal, he took his steps informally instead of formally" (R. 32).

V

Specification of Errors

The decision of the Circuit Court of Appeals is erroneous:

I. In holding that, although the Act of February 13, 1925, 28 U. S. C., §230, governs appeals in admiralty, mere "substantial reliance" upon its provisions is sufficient.

2. In holding that the statutory requirements are met if a litigant intends to appeal and takes such steps as he thinks are requisite.

3. In holding that an appeal from a final decree in admiralty may be taken merely by filing a notice of appeal and communicating to the District Judge an intention to appeal, without request for any action by the court to allow the appeal during the three months' period.

4. In holding that the Circuit Court of Appeals has jurisdiction of an appeal from a final decree in admiralty, allowed by the District Court upon application made more than three months after entry of the decree.

5. In failing to hold that an appeal from a final decree in admiralty is not validly taken unless the appellant, within three months from the entry of the decree, applies to the District Court for its present action allowing the appeal.

VI

Questions Presented

The first and second questions presented by the petition for the writ and now before this Court are as follows:

1. May an appeal from a final decree in admiralty be taken without making an application for allowance thereof within three months from the entry of the decree appealed from?

2. Does the mere filing of a notice of appeal in admiralty and an inquiry of the District Judge concerning the amount for which a bond for appeal costs should be issued, but without request for allowance of appeal or for any action by the Judge within three months from the entry of the decree, constitute a "duly made" application for "allowance" of an appeal in admiralty?

POINT I

The Circuit Court of Appeals erroneously held that an appeal from a final decree in admiralty may be taken without application for allowance thereof within three months from the entry of the decree appealed from, as required by the Act of February 13, 1925, 28 U. S. C., §230.

Prior to September 16, 1938 all appeals in actions at law, in equity and in admiralty were governed by Section 8[c] of the Act of February 13, 1925, c. 229, 43 Stat. 940, 28 U. S. C., §230, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

By the Act of June 19, 1934, c. 651, §1, 48 Stat. 1064, 28 U. S. C. 723(b), this Court was granted the power to prescribe by general rules, the forms, practice and procedure in civil actions at law. Rule 1 provides that the Rules shall govern the procedure in the District Courts in actions at law and equity, except as stated in Rule 81. Rule 81(a)(1) provides:

> "These rules do not apply to proceedings in admiralty."

Congress has not altered the controlling statute, nor has this Court altered the admiralty rules so as to permit an appeal in admiralty to be taken by merely filing a notice of appeal, as permitted in actions at law and equity by Rule 73 of the Federal Rules of Civil Procedure. The provisions of 28 U. S. C., §230, continue to govern the requirements for taking an appeal in admiralty. *The Fanny D.*, C. C. A. 5, 112 F. (2d) 347, 349, cert. den. 311 U. S. 680; *Blaske* v. *Dick*, C. C. A. 7, 126 F. (2d) 96. In

deed, the court below stated that the Federal Rules of Civil Procedure do not apply in admiralty (R. 30), although in effect it disposed of the case as if they did.

The Act of February 13, 1925, U. S. C., §230, has the same application to decrees in admiralty that it had to decrees in equity and judgments at law prior to the Federal Rules of Civil Procedure. *Alaska Packers Assn.* v. *Pillsbury*, 1937, 301 U. S. 174, 177. Accordingly it is clear that the authorities construing the statute before the promulgation of the Federal Rules of Civil Procedure remain applicable to its construction in respect of appeals in admiralty.

That the Federal Rules of Civil Procedure may not be extended by implication beyond the scope of their explicit terms in respect of statutory appeals is established by *McCrone* v. *United States*, 1939, 307 U. S. 61, where this Court dismissed an appeal in a civil action for failure to apply for its allowance under 28 U. S. C. A., §230, notwithstanding that the Federal Rules of Civil Procedure, dispensing with the requirement of application for allowance, became effective only three weeks after the time for the appeal expired. *A fortiori* the Rules do not apply to appeals in admiralty, which they expressly exclude.

It is accordingly clear that appeals in admiralty continue to be governed by the requirements of 28 U. S. C., §230, and the authorities which have construed it.

It is not open to question that the right to appeal in admiralty, as was the right to appeal in civil actions prior to the Federal Rules of Civil Procedure, is conditioned upon compliance with the express statutory requirements, and that acts falling short of such compliance do not confer jurisdiction upon the Circuit Court of Appeals. *Alaska Packers Assn.* v. *Pillsbury*, supra, established unequivocally that an appeal in admiralty is not validly taken unless its allowance by the court or judge is duly applied for within three months from the entry of the decree, and that even a rule of the Circuit Court of Appeals cannot dispense

with this requirement. Pointing out that even before the creation of the Circuit Court of Appeals the authorized procedure for taking an appeal from a decree in admiralty was by making application to the court rendering the decree, or to a judge or justice, and obtaining an allowance of an appeal, as held in *Barrel* v. *Transportation Co.*, 3 Wall. 424, this Court in the *Pillsbury* case said:

> "The reasons for requiring that an appeal be duly applied for and allowed are that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made. The reasons for thus conditioning the right of appeal have the same application to decrees in admiralty that they have to decrees in equity and judgments at law; and the act of 1925 includes one as much as another, for it says: 'No • • • appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made' • • • In the one circuit a rule exists whereby appeals in admiralty are excepted. But that rule contravenes the statute and has no force, for the power of a court to make rules necessarily is confined to such as are consistent with controlling laws" (p. 177).

In *McCrone* v. *United States*, supra, this Court, citing *Alaska Packers Assn.* v. *Pillsbury*, held that an appeal from a civil judgment under 28 U. S. C., §230, prior to the effective date of the Federal Rules of Civil Procedure, was invalid because taken only by filing a notice of appeal

and obtaining the trial judge's signature to a bill of exceptions, saying:

> "The controlling statute required application for allowance of a civil appeal within three months after judgment from which appeal was sought" (p. 65).

The requirements of the statute, 28 U. S. C., §230, are "mandatory and jurisdictional", and cannot be avoided by consent, waiver or even order of the court: *Robertson* v. *Morgantown Full Fashioned Hosiery Co.*, C. C. A. 4, 95 F. (2d) 780; *Osborn* v. *United States*, C. C. A. 4, 50 F. (2d) 712; *Morrow* v. *Wood*, C. C. A. 5, 126 F. (2d) 1021; *Vaughan* v. *American Insurance Co.*, C. C. A. 5, 15 F. (2d) 526; *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750, cert. den. 280 U. S. 584; *Robie* v. *Hart, Schaffner & Marx*, C. C. A. 8, 40 F. (2d) 871; *Collins* v. *United States*, C. C. A. 8, 24 F. (2d) 823.

The "application" which the statute requires to be "duly made" is a submission of the appeal to the court or judge, during the three months' period, for its immediate and present action allowing the same. *Alaska Packers Assn.* v. *Pillsbury*, supra; *McCrone* v. *United States*, C. C. A. 9, 100 F. (2d) 322, aff'd 307 U. S. 61; *United States* v. *New National Coal & Mining Co.*, C. C. A. 7, 72 F. (2d) 168; *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669; *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61; *Camden Iron Works* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846.

If the acts performed by the litigant within the prescribed period do not comply with the statutory requirements, even a nunc pro tunc order of the court is of no avail. *Old Nick Williams* v. *United States*, 215 U. S. 541; *Credit Co.* v. *Arkansas Central Ry.*, 128 U. S. 258; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61.

In the case at bar it is perfectly clear that no application for allowance of its appeal was made by respondent herein before the expiration of the three months' period on July 20, 1943. This failure is established beyond doubt (1) by the recital in the District Judge's nunc pro tunc

order of August 30, 1943, that the Judge learned of respondent's intention to appeal during the period, had not indicated any intention to disallow the same, and "undoubtedly would have allowed the appeal *if and when* requested" (R. 24); (2) by resopndent's actually submitting a petition for allowance of appeal on August 12, 1943, allowed by the District Judge the next day—more than three weeks after the three months' period had expired (R. 18-19, 24); (3) by respondent's ultimate reliance upon a mere inquiry of the District Judge concerning the amount of a bond for costs on appeal (R. 32), which, however, was not obtained until afterward, or submitted to the court's approval at all, or filed until July 21, three months and a day after the final decree was entered (R. 1, 22).

It follows that the court below did not acquire jurisdiction of the attempted appeal, and should have granted the motion to dismiss.

POINT II

The mere filing of a notice of appeal in admiralty and an inquiry of the District Judge concerning the amount for which a bond for appeal costs should be issued, but without request for allowance of appeal or for any action by the Judge within three months from the entry of the decree, did not constitute a "duly made" application for "allowance" of an appeal in admiralty required by the statute.

Though prefacing its opinion with the statement that "jurisdiction in admiralty depends upon substantial reliance upon 28 U. S. C. Sec. 230" (R. 31), the court below in effect ignored the statutory requirement of due application for allowance of the appeal within the three months period. Indeed, the court did not hold that respondent made a timely application for allowance of its appeal, but based its decision on the ground that what respondent did "amounted to a timely application to appeal" (R. 33).

What respondent did within the three months' period, however, was (1) merely file a notice of appeal in the office of the District Court clerk, and (2) ask the District Judge the amount of a bond for costs on appeal.

The filing of a notice of appeal does not constitute application for allowance of appeal. *Barrel* v. *Transportation Co.*, 3 Wall. 424; *Alaska Packers Assn.* v. *Pillsbury*, supra; *McCrone* v. *United States*, supra.

The "application" for allowance of appeal, required by the statute, necessarily carries the element of request. *Osborn* v. *United States*, C. C. A. 4, 50 F. (2d) 712, 714; *Robie* v. *Hart, Schaffner & Marx*, C. C. A. 8, 40 F. (2d) 871, 872; *Von Holt* v. *Carter*, supra.

The interpretation which the Circuit Court of Appeals for the Ninth Circuit, where the case arose, placed upon the decision of this Court in the *Alaska* case, is found in Rule 1 of its amended Rules in Admiralty:

> "Appeals in admiralty shall be taken by filing with the clerk of the trial court a petition for appeal, and obtaining an allowance thereof, within the statutory time."

It is manifest that respondent's mere inquiry of the District Judge as to the amount of a bond for costs on appeal was not an application to him for any present action allowing an appeal. No bond was presented for approval. Indeed, the bond was not obtained until later, and was not filed until the day after the three months' period had expired (R. 1, 2, 19, 22). Within the period nothing was presented to the Judge for his examination and action either to allow or disallow the appeal.

Respondent's inquiry of the District Judge concerning the amount for which an appeal cost bond should be obtained was at most merely an indication of its intention to appeal, without request for its allowance, and, as shown by the Judge's subsequent nunc pro tunc order of August 30, 1943 (R. 24), it was so understood by him. It was of no greater significance than a notice of appeal, and did not fulfill the requirements of the statute.

In *McCrone* v. *United States*, 1939, 307 U. S. 61, petitioner filed a notice of appeal and lodged with the clerk a proposed bill of exceptions which was settled and allowed by the District Court within three months from entry of the judgment. The Circuit Court of Appeals dismissed the appeal because timely application had not been made for its allowance as required by 28 U. S. C., §230, 100 F. (2d) 322, saying:

> "There was nothing equivalent to the application for and allowance of an appeal" (p. 324).

Affirming the dismissal, this Court said:

> "A notice of appeal was filed and a bill of exceptions signed. But petitioner's appeal was not, as appeals from civil judgments were required to be, applied for or allowed by the trial judge or a judge of the Court of Appeals. 28 U. S. C. §230; Alaska Packers Assn. v. Pillsbury, 301 U. S. 174" (p. 62).
>
> * * * * * *
>
> "The controlling statute required application for allowance of a civil appeal within three months after judgment from which appeal was sought" (p. 65).
>
> * * * * * *
>
> "The Court of Appeals was not in error in dismissing petitioner's appeal for failure to comply with the statutory requirements governing civil appeals" (p. 65).

In *United States* v. *New National Coal & Mining Co.*, C. C. A. 7, 72 F. (2d) 168, the court said:

> "Appeal is granted to a losing party on condition that he complies with the terms of the law whereby it is authorized. * * * Merely declaring that he will appeal does not of itself amount to taking an appeal; nor does the mere filing of a petition for appeal have that effect. The filing of the petition for appeal avails nothing unless within the statutory time allowed for taking the appeal it is brought to the attention of the judge *for action thereon*" (p. 168).

In *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669, counsel for appellant, within three months, served and filed a notice of appeal and, in conference with the District Judge, presented to him an application for an allowance of the appeal but did not leave the papers with the Judge. In dismissing the appeal the court said:

> "It is clear that for some reason the petition for appeal, accompanied by the assignment of errors, was not finally submitted to the trial judge *for action at that time;* nor is there any suggestion that counsel seeking the appeal, at the time of the Duluth interview, had done all that he was required to do in order to have the appeal allowed, and that the delay was due solely to inaction by the court" (p. 670).

In *Camden Iron Works* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846, counsel, within the statutory time, withdrew his appeal papers from the clerk's office and brought them to the attention of the District Judge in connection with efforts to settle the bill of exceptions. Dismissing the appeal, the court said:

> "But we are not satisfied that application was then and there made for an *immediate or present allowance* of writ of error * * *" (p. 849).
>
> "We thus think that plaintiff in error has failed to show with requisite clearness that it did all within its power to procure the issuing of the writ within the statutory period" (p. 850).

The duty to apply for an allowance of appeal rests upon the appellant, not upon the clerk of the court. *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61; *Greyerbiehl* v. *Hughes Electric Co.*, C. C. A. 8, 294 Fed. 802, 804, cert. den. 264 U. S. 589; *Kentucky Coal Co.* v. *Howes*, C. C. A. 6, 153 Fed. 163.

In holding that respondent's acts in merely filing a notice of appeal and asking the District Judge the amount of a bond for costs on appeal, to be obtained subsequently, "amounted to" the making of due application for allow-

ance of appeal; the court below has construed the controlling statute, 28 U. S. C., §230, contrary to its express terms and has in effect nullified it. The fallacy of the reasoning by which it arrived at its conclusion will be shown in our next point.

POINT III

The court below erroneously held that respondent's attempted appeal was valid because respondent intended to appeal and thought it was taking the steps necessary to do so.

Misinterpreting the controlling statute by the statement that "jurisdiction in admiralty depends upon substantial reliance upon 28 U. S. C. Sec. 230" (R. 31) the court below proceeded to avoid its requirements by holding in effect that an appeal in admiralty may be taken without timely application for its allowance. The court based its decision, not upon any finding that such an application was made, but upon the theory that because respondent intended to appeal and thought it was taking the requisite steps, it would be "a travesty upon justice" to hold that its procedure was insufficient to accomplish its purpose (R. 32). Although the court did not say that the statute did not apply, it indirectly achieved the same result by holding that respondent took its steps "informally" (R. 32). This, however, is merely a figure of speech because respondent did not in fact apply to the court or judge for allowance of appeal, either formally or informally, within the three months' period. All it did was to bring to the judge's attention an intention to take an appeal, which as we have shown in Point II, supra, is entirely insufficient.

The court below evidently considered that the requirements of the statute are a mere formality which can be ignored by an intention to take an appeal, accompanied by acts which a litigant thinks are sufficient. The court's reasoning is clearly apparent from its language, as follows:

> "We agree with appellant. It is quite plain that it was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the *Alaska* case, which, though not directly in point, is disturbing; we should not hesitate to hold: that what appellant did amounted to timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established. It is quite clear that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve. We think that *R. F. C.* v. *Prudence Corp.* and the other cases cited above warrant our taking jurisdiction and denying the motion to dismiss" (R. 32, 33).

In other words, the court adopted the theory that appellate jurisdiction in admiralty does not depend upon compliance with the requirements prescribed by Congress, but is governed by the procedures which a litigant thinks are sufficient to accomplish his purpose. It would seem that the mere expression of this doctrine carries its own refutation.

By its admission that "the language of the opinion in the *Alaska* case * * * is disturbing" (R. 32-33), the court below gave clear evidence of its doubt that its decision squared with this Court's construction of the statute. Its attempt to avoid the *Alaska* decision by the statement that it is "not directly in point" (R. 32) is not supported by the showing of any ground for distinction.

Its holding that, because respondent "was endeavoring to appeal" and "the judge and everyone else thought it was effectively appealing",* its procedure should have "the legal effect it was designed to achieve" (R. 33) is clearly

* "Everyone else concerned" cannot include petitioner's counsel who merely received such papers as respondent's counsel chose to serve (R. 17, 22-30).

erroneous. Its fallacy is shown in *Alaska Packers' Assn.* v. *Pillsbury*, supra, where this Court said:

> "While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made" (p. 177).

If a litigant's belief in the correctness of his own procedure sets the standard of appellate jurisdiction, then Congress loses control over statutory courts and *Alaska Packers Assn.* v. *Pillsbury*, *McCrone* v. *United States*, and the other cited cases dismissing appeals for failure to comply with the statutory requirements have been wrongly decided. Indeed, in the *Alaska* case both the appellant and the Circuit Court of Appeals "thought" he was "effectively appealing" because he complied with a long-standing rule of that court dispensing with application for allowance of appeals in admiralty.

Statutory requirements for taking an appeal are not a mere formality which can be dispensed with, as the court below apparently considered. *United States* v. *Curry*, 6 How. 106, 113; *Saltmarsh* v. *Tuthill*, 12 How. 387, and authorities cited supra, p.

In *Matton Steamboat Co.* v. *Murphy*, 1943, 319 U. S. 412, this Court held that no jurisdiction was acquired under 28 U. S. C. §350, governing appeals to this Court in language substantially identical with 28 U. S. C. §230, where application was made to this Court after application to a judge of the state court had been made and denied, and the three months' period had expired. Stating that appellate procedure is controlled by Congress, not by litigants, this Court dismissed the appeal because not applied for in time. There, too, appellant "thought" he was "effectively appealing".

Unfamiliarity with the statutory requirement of application for allowance of appeal does not excuse a litigant from the result of non-compliance. *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750, 751; cert. den. 280 U. S. 584.

The error into which the court below fell was to extend a tolerance of informal procedure so as to dispense entirely with performance of an act which Congress has prescribed as essential to appeal. Liberality may not be carried so far. *McCrone* v. *United States*, C. C. A. 9, 100 F. (2d) 322, 324, aff'd 307 U. S. 61.

Admiralty proceedings cover a multiplicity of relationships and frequently involve numerous parties both direct and by impleader under the 56th Rule in Admiralty, and also by cross-libel, intervention and as claimants in proceedings for limitation of liability. There are cogent reasons for retaining the statutory requirement of timely application for allowance of an appeal in admiralty, so that, as this Court held in *Alaska Packers Assn.* v. *Pillsbury*, supra,

> "* * * there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. In this way improvident and unauthorized appeals are prevented" (p. 177).

If the requirement of application for allowance of an appeal in admiralty is no longer desirable, then Congress, and Congress alone, should make the change. Congress has not seen fit to alter 28 U. S. C. §230 in respect of appeals in admiralty, and "the power of a court to make rules necessarily is confined to such as are consistent with controlling laws", *Alaska Packers Assn.* v. *Pillsbury*, supra. The statute should not be nullified by characterizing the application of its requirements as "a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty on justice" (R. 32).

In relying upon *R. F. C.* v. *Prudence Group*, 1941, 311 U. S. 579, as warranting its taking jurisdiction and denying the motion to dismiss the appeal (R. 33), the court below apparently considered that this Court has established a

general rule that a statutory requirement for allowance of an appeal may be disregarded, overlooking the exceptional circumstances of that case. There the Circuit Court of Appeals for the Second Circuit, where the case arose, had held in *London* v. *O'Dougherty*, 102 F. (2d) 524, that appeals from certain compensation orders in bankruptcy cases could be taken as a matter of right. In reliance upon the permanency of that decision, the appellants filed notices of appeal from compensation orders without making application to the Circuit Court of Appeals for leave to appeal. Thereafter this Court, in *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, held that appeals from such orders may be had only at the discretion of the Circuit Court of Appeals. Misled by the decision of their own court in *London* v. *O'Dougherty*, the appellants were thus caught in a trap. This Court held that in view of the circumstances and the diligence of appellants in following the then established procedure, "it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London* v. *O'Dougherty*, supra" (p. 583). But this Court carefully pointed out that:

> "The proper procedure for taking them [appeals] is by filing in the Circuit Court of Appeals, within the time prescribed in § 25(a), applications for leave to appeal, not by filing notices of appeal in the District Court as was done here" (p. 581).
>
> "Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient" (p. 582).

Concurring, Mr. Justice Reed, Mr. Justice Roberts joining with him, said:

> "Timely application to the circuit court of appeals for leave to appeal is a jurisdictional requirement, and • • • the practice followed in this case cannot be reduced to a mere procedural irregularity. • • • How-

ever, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London* v. *O'Dougherty*, 102 F. (2d) 524. In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires" (p. 583).

In the case at bar, no exceptional circumstances whatever were present, and respondent was not misled by any unsettled practice or conflict of authority. *Alaska Packers Assn.* v. *Pillsbury* stood as a clear and final pronouncement that 28 U. S. C. §230 means what it says and that appeals from final decrees in admiralty are invalid unless application is duly made to the court for allowance of appeal within three months from the entry of the decree. The record is barren of any justification for respondent's failure to make such application to the District Judge who was available and whose nunc pro tunc order of August 30, 1943, shows he was not requested to allow an appeal (R. 24). The practice in the Second Circuit, where proctors for respondent principally practice (R. 24), is definitely established, not only by *Alaska Packers Assn.* v. *Pillsbury*, but by Rule XXXVIII of the Rules of the Circuit Court of Appeals for the Second Circuit which provides in respect of appeals in admiralty:

"* * * An allowance of the appeal shall be obtained and filed with the notice."

LAST POINT

Both questions presented to this Court should be answered in the negative. The decree of the Circuit Court of Appeals should be reversed with directions to dismiss the attempted appeal to that court for lack of jurisdiction and to reinstate the final decree of the District Court.

Respectfully submitted,

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Dated, New York, December, 1944.

(Emphasis throughout is supplied.)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,
Respondent
(Libellant-Appellant below).

PETITIONER'S REPLY BRIEF.

JOHN TENEY CARPENTER,
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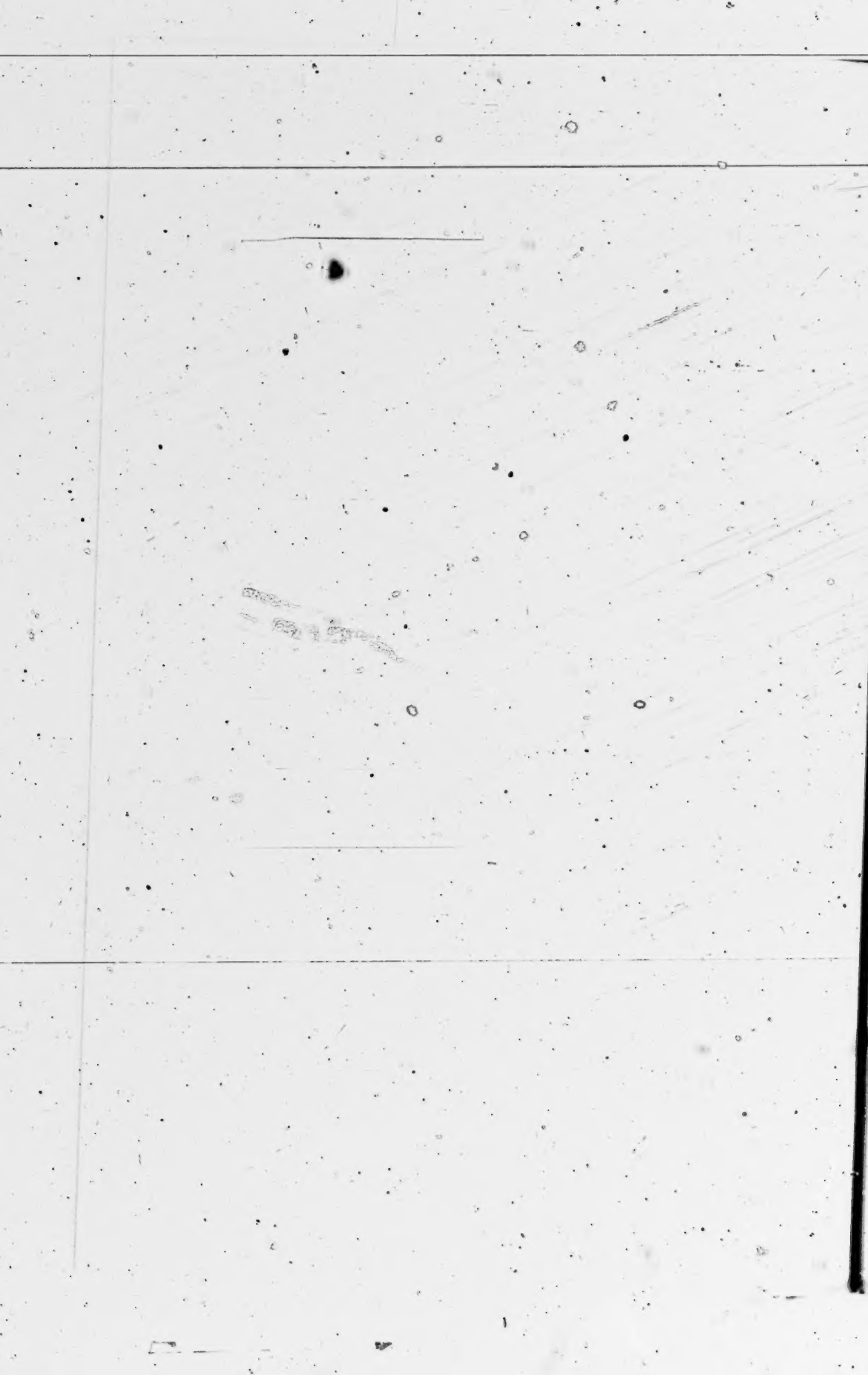

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,
Respondent
(Libellant-Appellant below).

PETITIONER'S REPLY BRIEF

The authorities cited in respondent's brief in support of its contention that the action of the District Judge in "fixing" the amount of bond on July 12, 1943, amounted to an allowance of an appeal, fall into four main classes, all involving circumstances different from the case at bar:

1. Cases in which actual application for allowance of appeal was made during the statutory period, and the right to appeal was held not defeated by the court's refusal to act. In *Steffler* v. *United States*, 319 U. S. 38 (respondent's brief, p. 9), petitioner timely filed with the District Court clerk a petition for leave to appeal from a criminal conviction in forma pauperis, which the clerk

returned to him by mail. After the Circuit Court of Appeals denied another application for leave to appeal in forma pauperis, this Court granted certiorari on the ground that petitioner had made proper application for allowance of appeal and it was the duty of the District Court to act upon his request to proceed in forma pauperis. In the case at bar the record shows no similar situation.

2. Cases in which the court, within the statutory period and upon application therefor, performed an official act which it could do only upon the basis that it had allowed an appeal. The following cases cited at page 6 of respondent's brief are in this category:

Brandies v. *Cochrane*, 105 U. S. 262, where complainants prayed an appeal on the same day the decree was entered, which was allowed upon their giving bond. No bond was furnished under that allowance, but within two years from the entry of the decree the Circuit Judge approved an appeal bond and signed a citation. This Court held that by so doing the Circuit Judge allowed an appeal. *Sage* v. *Central Railroad Co.*, 96 U. S. 712, where this Court held that, when one of its justices approved a supersedeas bond during the term, he allowed the appeal. *Crescent Wharf & Warehouse Co.* v. *Pillsbury*, C. C. A. 9, 93 F. (2d) 761, cert. den. 304 U. S. 571, where a bond for appeal costs was presented to the District Judge and approved by him within the three months' period. *Brown* v. *McConnell*, 124 U. S. 489, where one of the justices of this Court, upon appellant's application, signed a citation returnable to the present term, but with no acceptance of security. This Court held that this action was in legal effect the allowance of an appeal but ordered the case dismissed unless appellants should file security. Similarly, in *Burley Welding Works* v. *Lawson*, C. C. A. 5, 141 F. (2d) 964, appellant gave notice of appeal and furnished a

bond for costs which was approved by the court within the three months' period. Likewise, in *Weinstein* v. *Black Diamond S.S. Corp. et al.*, C. C. A. 2, 31 F. (2d) 519, cited at page 13 of respondent's brief together with *Crescent Wharf & Warehouse Co.* v. *Pillsbury* and *Burley Welding Works* v. *Lawson*, supra, a supersedeas bond was filed and approved by the District Judge within the three months' period.

The facts presented in the present case are wholly different from the facts upon which the above authorities rested. In the present case the District Judge did not approve any bond for costs or issue a citation or other document within the three months' period. He did no more than inform respondent's counsel that a bond for costs on appeal should be for the amount of $250 (R. 30). No bond was then presented to him, and in fact none was issued until four days later or filed until the day after the three months' period expired, and then without submission to the Judge for his approval at all (R. 1, 30).

The distinction between the situations presented in the second class of cases listed above and the case at bar was pointed out by the Circuit Court of Appeals for the Ninth Circuit in *McCrone* v. *United States*, 100 F. (2d) 322, affirmed 307 U. S. 61, where the action taken within three months and relied on as an application for allowance of appeal consisted of the filing of a notice of appeal and the settlement and allowance by the District Court of a bill of exceptions. Distinguishing its previous opinion in *Crescent Wharf & Warehouse Co.* v. *Pillsbury*, supra, relied on at pages 6, 12-13 of respondent's brief, the court held that this was not equivalent to application for and allowance of an appeal under 28 U. S. C. § 230. It is noteworthy that the dissenting opinion of Haney, C. J., did not state that the actions taken amounted to an allowance of appeal, but was founded upon the opinion that the Federal Rules of Civil Procedure, subsequently effective, required simplified procedure so as "to abolish many technicalities which could be used to defeat a decision on the merits" (p. 325).

3. Cases in which an appellant has been entrapped into adopting incorrect procedure. In *R. F. C.* v. *Prudence Group*, 311 U. S. 579, cited at pages 6, 5, 8 and 10 of respondent's brief and principally relied on by the court below (R. 32), appellant was misled by a decision of its own Circuit Court of Appeals into believing that appeals from certain compensation orders in bankruptcy could be taken without application to the Circuit Court of Appeals for leave to appeal. The exceptional circumstances of that case are pointed out at pages 20-23 of petitioner's main brief. In *Crump* v. *Hill*, C. C. A. 5, 104 F. (2d) 36, cited at page 8 of respondent's brief, appellant was misled by appellee's action in acknowledging service of a notice of appeal and designation of contents of record, and in filing a designation of contents of record, all within the three months' period. No similar situation is presented in the case at bar.

4. Cases in which an appeal, validly taken under one section of a statute, has been regarded as properly taken under another section of the same statute. In this category belong *Wilson* v. *Alliance Life Ins. Co.*, C. C. A. 5, 102 F. (2d) 365, and *Baxter* v. *Savings Bank of Utica*, C. C. A. 5, 92 F. (2d) 404, in which the court below held that an appeal perfected under Section 24a of the Bankruptcy Act could be taken as perfected under Section 24b of the same act (11 U. S. C. § 47(a) and (b)). No parallel situation is presented here.

Miller v. *Tietjen & Lang No. 2*, C. C. A. 3, 143 F. (2d) 711, cited at pages 14-16 of respondent's brief, falls into none of the foregoing categories. In that case the court held that the mere filing of a notice of appeal within three months was "a due and sufficient application for the formal allowance of the appeal" in admiralty. The court's opinion cites the decision of the court below in the case at bar as authority for its holding which is in direct conflict

with *Alaska Packers Assn. v. Pillsbury*, 301 U. S. 174, cited in petitioner's main brief.

The case at bar falls into none of the classes of the authorities cited in respondent's brief except the last mentioned case, which clearly was erroneously decided. Respondent's inquiry of the District Judge as to the amount of a bond for costs on appeal was merely a request for information. The District Judge's "fixing" the amount of the bond at $250 was only a statement of what a rule of court would require concerning a step to be subsequently taken by a party desiring to appeal. No such bond being submitted within the three months' period, the consultation with the District Judge was purely anticipatory to a later application for an allowance of appeal, which respondent did not in fact make until three weeks after the statutory period expired (R. 18, 19).

The objections to the requirements of 28 U. S. C. § 230, presented at page 10 of respondent's brief, would more properly be addressed to Congress than to the courts. They are unfounded, however, for in actual practice no hardship or confusion is involved in submitting to a District Court proper appeal papers in an admiralty case and requesting its allowance of appeal. Difficulty and confusion arise only when the rule is violated, and then the rule itself is denounced.

Respectfully submitted,

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Dated, New York, December 12, 1944.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 180.

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner,

—against—

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
Owner of the S. S. KOTOR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILBUR E. DOW, JR.,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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IN THE

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OCTOBER TERM, 1944.

No. 180.

GEORGIA HARDWOOD LUMBER COMPANY,

Petitioner,

against

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S. S. KOTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 141 Fed. (2d) 652 (1944). The opinion of the District Court is reported in 48 F. Supp. 402 (1942).

The Questions Presented.

I.

Where notice of appeal has been timely served and filed, the District Court Judge setting the amount of the bond at the time of filing, is it necessary that the appeal be formally allowed by the District Court

Judge within the 90-day period, where he formally allowed the appeal at a later date, filing an order as part of the record (R. 112) wherein he stated that he knew the appellant was appealing, had not indicated any intention of not allowing it but was of the opinion at the time that formal allowance was no longer necessary?

The Circuit Court held that the appeal was perfected, its jurisdiction established and "that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve".

II.

Where timbers were loaded on railroad flat cars, hauled a distance, weighed by certified Weighing Masters and railroad bills of lading issued showing the weights on each car (average weight per board foot 61.75 pounds), after which the timbers were hauled to tidewater and there loaded aboard a ship under a contract of affreightment containing a warranty of a maximum weight per board foot (in this case, 4 pounds) does the burden of proof as to a loss of weight in transit from railroad scales to contract specifications at ship's side lie with the shipper claiming the loss in weight or the ship receiving the timbers?

The District Court held it rested with the ship. The Circuit Court, in a reversal, held it rested with the shipper claiming the change in weight. * * * The evidence of the rail weights was sufficient unless overthrown to entitle libellant to judgment. In the face of the positive rail weights obtained and furnished

by respondent (shipper), it was not sufficient for respondent to offer opinion testimony of the vague and unsatisfactory nature of that offered. * * *".

Short Statement of the Facts.

Libellant, owner of the SS "Kotor" of Panamanian registry, through their New York agent, Garcia & Djaz, acting through a freight broker, Cavalier Shipping Company which represented both libellant and respondent as a broker, contracted to carry "*,* * 750,000 board feet of pine timbers not exceeding 4 pounds per board foot at $70.00 per 1,000 feet * * *". The contract was signed by both parties. The respondent did not ship these timbers, all heavy joists, 6 x 6 inches and 10 x 10 inches, from its own mills but purchased them at six different points throughout Florida, Alabama and Mississippi, of which about 75% came from Century, Florida and Brewton, Alabama. Most of these timbers were "water-stored"; that is, had been in mill ponds from two months to a year, were hoisted aboard flat cars and carried from 40 to 60 miles by rail and weighed from 24 to 48 hours after leaving the water and while en route to Jacksonville. These timbers averaged 43¼ pounds to the board foot at time and place where and when weighed by certified railway Weighing Masters. After remaining in Jacksonville from 1 to 5 days, these timbers were loaded aboard the ship. The weather throughout the south was extremely humid, particularly at Jacksonville, where it rained every day but two during the time the first car arrived at Jacksonville until the last car was loaded aboard the ship.

Respondent declined to pay freight except on the basis of its contract maximum of 4 pounds to the board foot and the balance due on the basis of the railroad weights was computed at approximately $9,300 and this sum deposited in escrow in the Atlantic National Bank of Jacksonville for subsequent arbitration. As arrangements were made by telephone between New York and Jacksonville agents, representing the carrier, and respondent's attorneys in Jacksonville, no arbitration agreement was signed. After the vessel sailed, respondent's President, Mr. Cheatham, declined to arbitrate, and libellant being unable to compel arbitration, commenced this action.

A complete resume of the facts, fully documented, appears in the opinion of the Circuit Court of Appeals.

The facts as submitted by counsel for petitioner differ in a number of small but important particulars. The timbers were not still wet from immersion in the water at the time they were weighed which took place from 24 to 48 hours after they were removed from the ponds. *Most of these timbers had been stenciled at the ponds before loading on the flat cars* which petitioner's witness Parker testified could not be done unless the timbers were surface dried (R. 68).

The separation strips between the timbers on the car were only sufficient for and for the purpose of stiffening the load and were not intended to air dry the timbers.

The first libellant knew that the weights per board foot were running in excess of the 4 pounds per board foot stipulated in the contract was when the timbers on the cars arrived at Jacksonville for loading. There was no indication whatsoever before that time that such would be the case. The only weights

ever provided by the petitioner were on the railroad bills of lading, certified by the railroad Weighing Masters, and they averaged about 4.75 pounds per board foot.

The ship's agent was willing to weigh sample cars, an easy matter involving comparatively little expense and time due to the identical nature of the timbers. It was unwilling to weigh the entire shipment and hold the vessel at the dock while this was being done. There were no scales at the docks and the entire shipment would have had to be hauled elsewhere for this purpose (R. 98).

Petitioner did not pay the full freight as per contract but only on the minimum basis of 4 pounds to the board foot, posting the balance in escrow with the Atlantic National Bank of Jacksonville for arbitration which was later refused and which resulted in the bringing of this action.

Petitioner's statement of the facts makes no reference to the weather conditions prevailing in the area at the time, which were extremely wet and humid, which all witnesses agreed would retard, if not altogether stop, any loss of moisture after the surface water had run off when hauled from the ponds.

POINT I.

The decision of the Circuit Court of Appeals on the jurisdictional question involved was proper and reasonable and in accord with the decision of other courts.

Under 28 U. S. C. A., Sec. 230, concerning appeals, "application therefor shall be made within three months after the entry of such judgment or decree".

On July 6, 1943, well within the three months' period, libellant's proctors served on respondent's proctors a copy of the notice of appeal and received admission of service thereof. The original notice of appeal was then forwarded to libellant's corresponding proctors in Augusta, Georgia, for service upon respondent's corresponding proctors, also of that city, and for filing with the District Court Clerk in Augusta, all of which was done on July 12, 1943. At this time and at the time of filing the notice of appeal libellant's Augusta proctors consulted the District Judge on the amount of the appeal bond as this was only the fourth admiralty case in the Southern Division of Georgia and, we were advised, the first to go up on appeal. Judge Lovett fixed bond at $250. The National Surety Company bond was procured on July 16 in the required amount and mailed to Augusta, where it was filed on July 21, together with the assignment of errors.

It has been repeatedly held that an allowance of an appeal, where application has been timely served, does not have to be made in any particular form or in any particular language, but that it can be spelled out from the conduct, intention, or expression of the District Judge. *U. S. v. Beaman*, 61 Fed. (2d) 493 (CCA 5th, 1932). The Court therein cited *Brandies v. Cochran*, 105 U. S. 262 (1882).

To the same effect is *The Bath*, 20 Fed. (2d) 314 (CCA 3rd, 1927). The appellant there filed his application within the 90 day period. The Court did not allow it until later and then *nunc pro tunc* as of the last day to file. The Appellate Court there said:

"If the appellant was late in applying for the

allowance of an appeal there is substance in the ground for dismissal because the limitation of this section is mandatory and therefore jurisdictional. *Maina* v. *Bodine* (C. C. A.), 16 F. (2d) 463; *The Steam Tug Albatross* v. *United States* (C. C. A.), 19 F. (2d) 141. When the time for applying for allowance of an appeal has expired it cannot be called back or revived by a *nunc pro tunc* allowance. *Credit Co.* v. *Arkansas Central Railway*, 128 U. S. 258, 261, 9 S. Ct. 107, 32 L. Ed. 448. But the provision limiting this court's appellate jurisdiction does not refer to the date of the granting of an application for the allowance of an appeal. On the contrary, it is confined to the 'application therefor * * *' within three months after the entry of such judgment or decree'. When applied for within the statutory period the law is satisfied and the right to an appeal subsequently allowed is established on the principle followed in *Weaver* v. *Blair, Commissioner* (C. C. A.), 19 F. (2d) 16. Delay by a court in allowing an appeal seasonably applied for can not defeat the applicant's right of appeal" (p. 316).

You would otherwise have the judicial version of a pocket veto. See also *U. S.* v. *Todor*, 41 Fed. (2d) 146 (CCA 7th, 1930). Application was filed in time but the Judge did not allow the appeal until much later, then *nunc pro tunc* as of the date filed. The Court held this to be in compliance with the statute. *Douglason* v. *Baltimore Acceptance Corp.*, 38 Fed. (2d) 215 (CCA 3rd, 1930), goes even further on this point. No papers of any kind were fixed within the statutory period, but there was some evidence that the Trial Judge had intended to allow the appeal. The Circuit Court sent the parties back to the Dis-

trict Court for it to determine whether or not it *had* allowed an appeal."

Concerning the above the Circuit Court of Appeals spoke as follows:

> "We agree with appellant. It is quite plain that it was endeavoring to appeal. That the Judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the *Alaska* case, which, though not directly in point, is disturbing, we should not hesitate to hold: that what appellant did amounted to a timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established. It is quite clear that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve. We think that *R. F. C. v. Prudence Group* and the other cases cited above warrant our taking jurisdiction and denying the motion to dismiss."

Petitioner relies heavily upon *Alaska Packers v. Pillsbury*, 301 U. S. 174 (1937), decided before the adoption of the new Federal Rules which simply held, and rightly so, that mere notice of intention to appeal does not and cannot constitute an application and allowance of an appeal. In the case at bar the notice of appeal was filed on the same day on which the District Judge was consulted on the amount of appeal bond, and which he fixed at $250. This bond was executed four days later at New York and filed with the Clerk in Augusta on July 21. This alone is quite sufficient as this Court decided in the case of *Brandies v. Cochrane*, above.

In the *Alaska* case, decided prior to the new Rules of Civil Procedure, the Court had before it the question of "whether an appeal to a Circuit Court of Appeals from a decree in admiralty in a District Court may be taken by simply filing in the office of the Clerk of the District Court, and serving on the proctor of the adverse party, a notice of appeal". Assuming for the moment that this case is controlling (and in view of the effect given to the notice of appeal in the Civil Rules, subsequently adopted, even though they do not apply to admiralty, and a subsequent Supreme Court case, *R. F. C. v. Prudence Group*, 311 U. S. 579 (1941), there is some doubt of this), the trial Judge in the case at bar still allowed the appeal, timely made, within the 90 day period. Even though the controlling statute, 28 U. S. C. A., Section 230, makes no reference to the time *when* the application for review shall be allowed, taking the *Alaska Packers* case at its face value, the appeal herein was allowed within 90 days of the date of the decree by both the action and intention of the trial Judge, a judicial act as this Circuit has held. In the *Alaska Packers* case the Court said at page 177:

> "The reasons for requiring that an appeal be duly applied for and allowed is that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. * * *"

The subsequent formal signature of the Court, which the Court itself did not believe necessary at

the time, was merely the perfection of the appeal, timely made and timely allowed. We submit that the propriety of review, the finality and character permitting re-examination and the amount of the appropriate security were all properly considered by Judge Lovett on July 12th, when the matter was before him. We presume that it was with due deliberation that he considered these matters and then and there determined to allow the appeal, omitting only his formal signature, which he later supplied. As stated above, this Circuit has held that a judicial act, to be valid, need not necessarily be in writing accompanied by the Judge's signature, the judicial act of allowance being spelled out from his conduct and expression with respect to other matters in the appeal, and as further evidenced by his *nunc pro tunc* order of August 30th.

Since the decision of the case at bar by the Circuit Court of Appeals for the Fifth Circuit, a similar case arose in *Miller* v. *Tietjen & Lang No. 2*, as yet unreported in the Federal Reporter but appearing now in 1944 A. M. C. 949, in the Third Circuit. In that case a notice of appeal was filed in the District Court before the 90-day period expired but the Judge did not sign it until sometime later. The Court there said:

> "Since appeals in the great majority of cases coming to this court are now required to be taken by the filing of a notice of appeal in the district court, this court in the interest of uniformity of procedure has directed by Rule 11 (1) that appeals in admiralty cases shall also be taken by filing a notice of appeal in the district court. The notice of appeal thus filed we regard as a 'due

and sufficient application for the formal allowance of the appeal. In this respect we follow the practice of the Circuit Court of Appeals for the Second Circuit. See rule 38 of that court. See also *Compania de Navegacion Transmar* v. *Georgia Hardwood Lumber Co.*, 1944 A. M. C. 575, 141 F. (2d) 652 (5 CCA, 1944). Compare *R. F. C.* v. *Prudence Group*, 311 U. S. 579 (1941).

In the present case the decree appealed from was entered in the district court on February 7, 1944 and the respondent's notice of appeal was filed in that court on May 4, 1944. Treating the notice as the application for the appeal, in accordance with our practice, it will be seen that the appeal was applied for within three months after the entry of the decree. The application was, therefore, in time.

The appeal was allowed on June 5, 1944, more than three months after the entry of the decree, by a judge of this court acting under the authority conferred upon him by Sec. 132 of the Judicial Code, 28 U. S. C. Sec. 228, his order of allowance being endorsed upon the copy of the notice of appeal filed in this court. The fact that the appeal was not allowed within three months after the entry of the decree is immaterial, however. It is settled that if the application for an appeal was made in time the mere date of its allowance is not controlling. *United States* v. *Vigil*, 77 U. S. 423 (1870); *Cardona* v. *Quinones*, 240 U. S. 83 (1916). An appellant may not be deprived of his right to an appeal by reason of the failure of a judge to act promptly upon his application.

The motion to dismiss the appeal is denied."

The facts in the *Pio Gon and Long No. 2* are not as strong as in the case at bar. There the notice of

appeal was merely filed but no action taken by the court on the bond, yet the Circuit Court of Appeals held this was sufficient application for allowance to satisfy the rule which has never required a court to act upon it within any given length of time. The Third Circuit Court cited this case at bar with approval in its opinion.

POINT II.

There has been no misconstruction by the Circuit Court of Appeals of the facts, the nature of the contract or the law of evidence.

The weights of the timbers as found and certified to by the railroad Weighing Masters were the only weights ever submitted by the shipper to the ocean carrier. The Circuit Court of Appeals properly held that if the shipper would then dispute positive weights as furnished by himself, he must do so in a convincing fashion and not in the vague and unsatisfactory manner of the testimony offered. Petitioner goes into great detail and cites many cases to show that there is no presumption of continuance of anything which is changeable in nature. No one questions this logic, but where a shipper obtains and furnishes, to an ocean carrier, positive railroad weights, he can only overthrow these weights by clear and convincing testimony to the contrary. Simply because he wishes to alter them does not thereby shift the burden of proof as to the actual weight of the timbers at shipside to the carrier who is perfectly willing to accept the actual and positive weights which the carrier has furnished him.

The Carriage of Goods by Sea Act, 46 U. S. C. A. 1303, states that:

> "(5) **Guaranty of statements.** The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."

The mere statement, by the shipper, in the face of contrary certified railroad weights, that they now meet a certain contract maximum, is not furnishing a weight, in the absence of proof of such a statement. This section of the statute puts the burden of proof as to the weight of goods squarely on the shipper; usually the only party in a position to know, in fact, makes him its guarantor in express words. By adoption of this Act, known as The Hague Rules, Congress followed the practice of all other maritime nations of the world.

As the appellate court has so carefully pointed out, the shipper's evidence of loss in weight during railroad transit, "vague and unsatisfactory" though it is, shows not that the timbers came down to the weight specified in the contract of affreightment, but that they did *not*.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

WILBUR E. DOW, JR.,
Counsel for Respondent.

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DEC 8 1944

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 180.

GEORGIA HARDWOOD LUMBER COMPANY,

Petitioner,

-against-

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
Owner of the S.S. KOTOR,

Respondent.

BRIEF FOR RESPONDENT.

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THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 180.

GEORGIA HARDWOOD LUMBER COMPANY,

Petitioner,

—against—

COMPANIA DE NAVEGACION TRANSMAR, S. A., OWNER of the S. S. KOTOR,

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the District Court containing findings of fact and conclusions of law is officially reported in 48 Fed. Sup. 402 (1942), and is printed in the record herein at pages 8 to 16. The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 141 Fed. (2d) 652 (1944), and is printed in the record herein at pages 27 to 33.

Jurisdiction.

Jurisdiction is provided by Title 28 U. S. Code, 347 (a).

As the writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit was limited to

the first and second questions presented by the petition, which questions pertain solely to procedure on appeal, we omit recital of the facts, on the merits of which the Circuit Court of Appeals reversed the findings of the District Court.

The Facts.

The facts concerning the procedure on appeal were succinctly stated by the Circuit Court of Appeals in its opinion, 141 Fed. (2d) 652, 654, as follows:

> "This is the record: On April 20, 1943, a final decree dismissing the libel was entered, and appellant did not within the 90 days from that date fixed by statute *formally* apply for and obtain the allowance of an appeal. Instead, on July 6, it issued, served on, and obtained the acceptance of respondent's proctors of, a notice of appeal, which notice on July 12th it filed in the office of the Clerk of the District Court, at which time *proctors for libellant consulted the district judge on the amount of the appeal bond. This, fixed at $250.00*, was executed in New York on July 16, and with assignment of errors, was mailed to and filed with the clerk on July 21st. On Aug. 6th, libellant prepared and swore to a *formal* petition for appeal, filed it on Aug. 12th, and on August 13th, obtained an order of allowance. On Aug. 30, the district judge signed and filed an order that the libellant be allowed an appeal *nunc pro tunc* as of July 12, 1943, the order reciting that it had been assumed by the proctors for libellant, now appellant, that the clerk of the court would present the notice to the judge for allowance of appeal, and that because of this reliance there is not *in the record* any allowance of this appeal prior to the order of Aug. 13. The

Emphasis throughout is supplied.

order also recited that the district judge learned during the 90 day period of the intention of appellant to appeal from the decree and had not indicated any intention to disallow the same, and undoubtedly would have allowed it if and when so requested, though he was of the opinion that under rule 10 (1) (Appeals in Civil Action) and rule 12 (Appeals in Admiralty), last paragraph (Appeals in Admiralty are otherwise covered by the general rules of the court) of the United States Circuit Court of Appeals for the Fifth Circuit, *formal* allowance was no longer necessary." (R. 30).

The appeal bond was executed in New York on July 16th with a bonding company which had been previously approved as a surety by the District Court in which it was filed.

The Question Presented.

The only question properly presented on this appeal is whether the filing of a notice of appeal in admiralty and an inquiry of the District Judge concerning the amount for which an appeal bond should be posted, and which bond the District Judge set at $250, with full knowledge that the appellant was appealing, and which he so confirmed in a subsequent order, constitute "application * * * duly made within three months * * *".

We submit that what was done goes even further than the mere application that the statute requires and constitutes an *allowance* of the appeal, even though such allowance might quite properly come later.

The Questions as Stated by Petitioner.

The questions upon which this Court granted certiorari are not fair statements of the question presented by this case because they omit pertinent facts which would give an entirely different picture.

POINT I.

Respondent's first question and Point I in support thereof are specious to the only real issue involved and are based on a conclusion of law assuming facts contrary to the findings of the Court below and inconsistent with the record.

Petitioner states in his first question to this Court as follows:

> "1. May an appeal from a final decree in admiralty be taken without making an application for allowance thereof within three months from the entry of the decree appealed from?"

The question actually involved in this case is whether "application" was in fact made within the statutory period. The question as stated by petitioner leaves out the facts pointed out by the Circuit Court of Appeals (R. 30), that a notice of appeal was served on opposing counsel and timely filed to the knowledge of the District Court; that on the same date he was consulted on an appeal bond which he agreed to take in the sum of $250, that the bond was duly executed within the 90-day period and thereafter filed. The question stated by the petitioner cannot fairly be asked in the case at bar since the real question raised is whether what was done constituted an "application" for allowance of appeal.

POINT II.

On the facts of record as collated by the Court below (page 2 this brief) application for allowance of appeal was in fact made within the statutory period, allowed by the District Judge and subsequently confirmed by formal *nunc pro tunc* order.

The second question as presented by the petitioner reads as follows:

> "2. Does the mere filing of a notice of appeal in Admiralty and an inquiry of the District Judge concerning the amount for which a bond for appeal costs should be issued, but without request for allowance of appeal or for any action by the Judge within three months from the entry of the decree, constitute a 'duly made' application for 'allowance' of an appeal in admiralty?"

We have three criticisms of this question. The filing of a notice of appeal is not a "mere" act even in admiralty where, since the new Federal Rules, it constitutes the entire necessary judicial process in all civil suits in all jurisdictions, and the principal and frequently the only process in admiralty suits. Secondly, the question omits the fact that the District Judge was consulted on the day when the notice of appeal, after having been served, was filed in his Court, that he was aware that it had been filed, and that he thereupon, on request, fixed the appeal bond at $250, which was duly executed before the 90 days expired. Thirdly, the word "allowance" does not appear in the statute, although the quotation marks used in the question may create the impression that it does. The word in the statute is "application", not "allowance".

The timely service and filing of a notice of appeal (or under the old cases a petition for appeal) and the action taken by the judge in fixing the bond within the statutory period has been held by this Court and numerous circuit courts of appeals to have constituted timely application and allowance without the necessity of the Court's formal signature. *Brandies v. Cochrane*, 105 U. S. 262 (1882); *Sage v. Central Railroad Co.*, 96 U. S. 712 (1878); *Crescent Wharf & Warehouse Co. v. Pilksbury* (C. C. A. 9th, 1938), 93 Fed. (2d) 764 (cert. den.); *Miller v. Tiebout & Isaac No. 2, supra*; *Brown v. McConnell*, 124 U. S. 489, 491 (1888); *Burley Welding Works v. Lawson* (C. C. A. 5th, 1944), 141 Fed. (2d) 964.

In *Brandies v. Cochrane*, *supra*, the appellant's notice of appeal was conditioned upon giving bond, which appellant failed to do until two years later. Two months after that the appeal was allowed *nunc pro tunc* as of the time the bond was posted. The Court stated:

> "The Circuit Judge, by taking the security and signing this citation, allowed an appeal. No formal order of allowance was necessary. *Sage v. R. R. Co.*, 96 U. S. 714; *Draper v. Davis* (102 U. S. 370). The appeal was, therefore, taken in time. The order of October 8th (*nunc pro tunc*) was not required to give it effect."

In *R. F. C. v. Prudence Group*, 311 U. S. 579 (1941), this Court, at page 582, said:

> "The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is

not affected, to disregard such an irregularity in the interests of substantial justice. *Cf. Taylor v. Voss*, 271 US 176, 70 L ed 889, 46 S Ct 461, 7 Am Bankr Rep (NS) 706, dealing with appeals and petitions for revision under earlier provisions of the Act. In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals. . . ."

The Court went so far as to say:

"The failure to comply with statutory requirements, however, is not necessarily a jurisdictional defect. *Cf. Alaska Packers Asso. v. Pillsbury*, 301 U. S. 174, 81 L. ed. 988, 57 S. Ct. 682."

It is submitted that the record clearly shows that the scope of the review was in no way affected; that there was no question of good faith of the appellants below, of dilatory tactics or of frivolous appeals. The best evidence of this, perhaps, is the fact that the Circuit Court of Appeals reversed the District Court on the merits in a carefully considered opinion. Substantial justice can only be done by an affirmance of that decision. Were this Court to reverse the opinion of the Circuit Court of Appeals, it would constitute a step backward into a rigorous formalism never before adhered to in our Federal Courts, and particularly courts sitting in admiralty. Every act of a Federal Judge would be without validity if he omitted his formal signature, even though the Judge, as in the case at bar, supplied it later while still of the opinion that it was not necessary.

Counsel believe it significant, as did the Circuit Court of Appeals in the case at bar, that the cases relied upon by petitioner were decided before the new Federal Rules of

Civil Procedure, at a time when the notice of appeal or petition for appeal) was only one step in the appellant's process. While it is true that under Rule 81 (a)(1) the Federal Rules of Civil Procedure do not apply to Admiralty, it has been held by this Court and Circuit Courts of Appeal that if the application is timely filed, the allowance may be made later. *R. F. C. v. Prudence Group*, 311 U. S. 579 (1941); *Heller v. Tietjen & Lang* (C. C. A. 3rd; June 9, 1944), 1944 A. M. C. 951 (unreported elsewhere); *Crump v. Hall* (C. C. A. 5th, 1939), 104 F. (2d) 36; *Wilson v. Alliance Life* (C. C. A. 5th, 1939), 102 F. (2d) 365; *Baxter v. Savings Bank* (C. C. A. 5th, 1937), 92 F. (2d) 404.

POINT III.

On the facts as found by the Circuit Court of Appeals the decision of that Court is in accord with the controlling authorities.

Counsel do not believe that all of the cases cited by petitioner require individual analysis here. Most of those on which he relies were carefully scrutinized by the Circuit Court of Appeals and found not to square with the case at bar on the facts.

To the cases relied upon before and discussed by the Circuit Court, as above, petitioner in his brief has cumulated others to the same effect and equally inapplicable.

Petitioner relies chiefly upon three cases: *Alaska Packers Association v. Pillsbury*, 301 U. S. 174 (1937); *Barrell v. Transportation Company*, 3 Wall. 424, (1866); and *McCabe v. United States*, 307 U. S. 61 (1939). It is submitted that none of these cases are applicable to

the decision of the Circuit Court of Appeals in the case at bar.

Farrell v. Transportation Company, supra, was a case in which the appellant, without any hope of success on the merits, filed in the Circuit Court of Appeals a petition for appeal addressed to the Supreme Court of the United States, with no allowance of any kind from any court. The Supreme Court simply held that such a proceeding was not warranted by any Act of Congress and that the Court had no jurisdiction because there had been no allowance of appeal below. *Cf. Stoffler v. United States*, 319 U. S. 38 (1943), where this Court held that refusal of the District Court even to consider a motion for appeal, and refusal of the Circuit Court of Appeals to allow the appeal, is no bar to an appellant's *right* to appeal. The mere filing of a motion for leave to appeal with the clerk of the District Court was sufficient "application", and preserved appellant's right.

McCrone v. United States, supra, involved an appeal in a civil contempt case, where the petitioner filed his application for an appeal *after the contempt judgment had become unappealable* and before the effective date of the new rules. The Court held that the Rules of Civil Procedure, applicable to "pending" cases, did not apply, since the right to appeal, and the Court's jurisdiction, had been lost prior to the effective date of the Rules.

The *Alaska Packers* case, *supra*, is the principal case upon which petitioner places reliance. The Circuit Court of Appeals found that that case does not square with the one at bar upon the facts. It was decided before the new Federal Rules of Civil Procedure were in effect. Under the 9th Circuit Rule in effect at that time no

allowance of any kind was required, formal or informal, and none was obtained. The case involved a question whether the 9th Circuit Rule was in contradiction of the statute (28 U. S. C. A., Sec. 230). The Court held that it was. *U. S. Watts, W. & Co. v. Unione Austriaca di Navigazione*, 248 U. S. 9 (1918); *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 254, 255 (1940); *R. F. C. v. Prudence Group, supra.*

The *Alaska Packers* case troubled the Circuit Court of Appeals perhaps even as it troubled the Court in *R. F. C. v. Prudence Group*, where the Court compared it with

* James Wm. Moore and Shirley Adelson, in *The Supreme Court: Its Term*, (1940) 26 Va. L. Rev. at pages 703-04 take this to say in respect of the desirability of the trend toward uniformity and the shedding of superfluous and archaic formalisms of appeal:

> "Since uniformity has been largely achieved as to the record on appeal, should not the simple notice of appeal also be the means of perfecting an appeal to all federal courts except for permissive appeals in bankruptcy? With deference to the Supreme Court it is submitted that the answer should be made in the affirmative. Aside from permissive appeals in bankruptcy, a petition for appeal, allowance and citation are formalities, since the appeal is of right if any appeal is proper. The substitution of simple notice of appeal (and retention of the Jurisdictional Statement for appeals to the Supreme Court) for the present formalized practice would not multiply frivolous or improper appeals. * * * Divergent methods of appeal result inevitably in confusion without compensation." (Citing, *e. g.*, *McTrons v. United States*, 307 U. S. 61 (1939).

And at pages 916-17:

> "On May 22, 1939, the Court promulgated amendments * * * to its Admiralty Rules. * * * the Court substituted five new rules on discovery taken literally from the Federal Rules. * * * By this action and by making the Federal Rules generally applicable to bankruptcy and copyright practice, the civil practice in the federal district courts approaches one system of procedure. *Provision for protecting appeals in admiralty along the lines of the Federal Rules would accelerate this commendable approach.*"

the doctrine invoked in that case that the failure to comply with statutory formalities is not necessarily a jurisdictional defect.

In the *Alaska* case the Court had before it the question of "whether an appeal to a circuit court of appeals from a decree in admiralty from a district court may be taken by simply filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice of appeal". The appeal in the case at bar, however, was duly applied for and *allowed* (albeit informally) within the ninety day period both by the acts of the trial Judge and his intentions as confirmed in his *nunc pro tunc* order of August 30, 1943. That order makes it clear, and the Circuit Court of Appeals so found, that the notice of appeal, after service on opposing proctors, failed to have a *formal* allowance thereof entered thereon by the Judge of that Court, that there was not in the *record* any allowance of the appeal allowed prior thereto, but that the District Judge learned during the ninety day period of the intention of appellant to appeal, and though he was of the opinion that *formal* notice was no longer necessary, and "in order that the record may show said allowance of the appeal prior to the expiration of said ninety day period", it was *formally* allowed *nunc pro tunc* as of the date on which the notice of appeal was filed, the same date on which, in conference with respondent's proctors, he set the appeal bond at $250.

In the *Alaska Packers* case the Court said at page 177:

> "The reasons for requiring that an appeal be duly applied for and allowed is that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be

re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. . . ."

There is nothing in the statute concerning the *allowance* referred to by the Court. There is no reference as to when the application for review should be allowed or in the precise manner in which it should be done. For that reason it is submitted that the Court in the *Alaska* case went beyond the statute and required more to be done for the perfection of the appeal than the Congress intended.

Respondent submits, however, taking the *Alaska* case at its face value, that the propriety of review; the finality and character permitting re-examination and the amount of appropriate security were all properly considered by Judge Lovett on July 12th when the matter was before him. It must have been with due deliberation that he considered these matters and then and there determined to allow the appeal, a judicial act, as this Court has held. He omitted only his formal signature, which he later supplied in his *nunc pro tunc* order.

In *Crescent Wharf & Warehouse Co.* v. *Pillsbury* (C. C. A. 9th, 1938), 93 Fed. (2d) 761, cert. den. 304 U. S. 571, decided after the decision of this Court in the *Alaska Packers* case, almost identical facts were involved as in the instant case. Rule 1 of the Ninth Circuit, as amended, provided that "Appeals in admiralty shall be taken in accordance with the statutes authorizing allowance of appeals". The only steps taken by appellants had been to file and serve a notice of appeal, and file and obtain the District Judge's approval of a bond for costs of appeal. The bond merely recited that appellants were "about to take" an appeal. The Court, in deciding the

appellants had complied with the statutory essentials, stated:

> "There was, it is true, no formal order allowing the appeal. Such orders, though customary and proper, are not indispensable. No statute prescribes the form or manner in which appeals to this court shall be allowed. In this case, we think the approval of the appeal bond was, in legal effect, an allowance of the appeal" (p. 763).

To the same effect see: *Weinstein* v. *Black Diamond S. S. Corp. et al.* (C. C. A. (2d), 1929), 31 Fed. (2d) 519; *Barlow Welding Works* v. *Lawson* (C. C. A. 5th, 1944), 141 Fed. (2d) 964.

While the Rules of Civil Procedure do not apply to admiralty, the courts have nevertheless adopted the same procedure with respect thereto without conflict with the statute which requires only that "* * * application therefor be duly made within three months * * *".

Admiralty Rule 12 of the Fifth Circuit, after providing that the record on appeal shall be made in the District Court, as provided in Admiralty Rule 49, in a paragraph on the taking of new evidence for consideration by the Circuit Court, states:

> "Appeals in admiralty are otherwise governed by the general rules of this court."

It was this rule (Rule 12) and Rule 10 (1) governing civil appeals under the new Rules of Civil Procedure, to which the District Judge referred in his *nunc pro tunc* order supplying a formal allowance when he stated that he believed formal allowance was no longer necessary.

For the convenience of the Court the Admiralty Rules

of the nine circuits are summarized in the footnote below.[1] *Benedict on Admiralty* (6th ed., 1940), Vol. 3.

It would appear from a resume of the rules of all circuits governing appeals in admiralty that with certain unimportant exceptions, the rule in the Fifth Circuit is generally followed and that no more formalities are required in an admiralty appeal than in any other civil matter. The rule in the Ninth Circuit is undoubtedly the result of the *Alaska Packers* case, which rule was formulated after that case was decided and before the new Rules of Civil Procedure went into effect.

Since the decision in the case at bar by the Circuit Court of Appeals for the Fifth Circuit, *Miller v. Tietjen & Lang, No. 2*, as yet unreported in the Federal Reporter but appearing now in 1944 A. M. C. 949, has been

[1] *First Circuit*—Rule 10. Almost identical with Rules of Civil Procedure. No allowance of any kind required.

Second Circuit—Rule XXXVIII. First sentence requires only filing of a notice of appeal with the Clerk of the District Court. Second sentence requires that allowance of the appeal shall be obtained and filed with the notice. It does not say when the allowance shall be obtained, how or by whom signed, but only that it shall be filed with the notice. In practice this is done by the Clerk.

Third Circuit—Rule 11 (1) follows Civil Rules in interest of uniformity.

Fourth Circuit—Rule 33, 73 (a) and (b) follows Federal Rules of Civil Procedure.

Fifth Circuit—Rule 12. Appeals in admiralty to be governed by the General Rules of the Court.

Sixth Circuit—Rule 12. Identical with Fifth Circuit.

Seventh Circuit—Rule 7. Follows Federal Rules of Civil Procedure.

Eighth Circuit—Same as Seventh Circuit.

Ninth Circuit—Rule 1. "Appeals in admiralty shall be taken by filing with the clerk of the trial court a petition for appeal and obtaining an allowance thereof, within the statutory time." As the statute only provides that an application shall be *duly* made with no provision for an allowance or when it shall be made, this rule appears equivocal.

decided (C. C. A. 3rd, June 19, 1944). In that case a notice of appeal was filed in the district court before the 90-day period expired but the Judge did not sign it until some time later. The court there said:

"Since appeals in the great majority of cases coming to this court are now required to be taken by the filing of a notice of appeal in the district court, this court in the interest of uniformity of procedure has directed by Rule 11 (1) that appeals in admiralty cases shall also be taken by filing a notice of appeal in the district court. The notice of appeal thus filed we regard as a due and sufficient application for the formal allowance of the appeal. In this respect we follow the practice of the Circuit Court of Appeals for the Second Circuit. See Rule 38 of that court. See also *Compania de Navegacion Transmar v. Georgia Hardwood Lumber Co.*, 1944 A. M. C. 575, 141 F. (2d) 652 (5 CCA, 1944). Compare *R. F. C. v. Prudence Group*, 311 U. S. 579 (1941).

In the present case the decree appealed from was entered in the district court on February 7, 1944 and the respondent's notice of appeal was filed in that court on May 4, 1944. Treating the notice as the application for the appeal, in accordance with our practice, it will be seen that the appeal was applied for within three months after the entry of the decree. The application was, therefore, in time.

The appeal was allowed on June 5, 1944, more than three months after the entry of the decree, by a judge of this court acting under the authority conferred upon him by Sec. 132 of the Judicial Code, 28 U. S. C. Sec. 228, his order of allowance being endorsed upon the copy of the notice of appeal filed in this court. The fact that the appeal was not allowed within three months after the entry of the decree is immaterial, however. It is settled that if the application for an appeal was made in time the mere date of its allowance is not controlling. *United States v. Vogt*, 77

U. S. 423, (1870); *Cardona* v. *Quinones*, 240 U. S. 83 (1916). An appellant may not be deprived of his right to an appeal by reason of the failure of a judge to act promptly upon his application.

The motion to dismiss the appeal is denied."

CONCLUSION.

The Court should affirm the opinion of the Circuit Court of Appeals that the serving and filing of notice of appeal coupled with obtaining of a bond on appeal in the amount fixed by the District Judge within the statutory period, together with the other relevant circumstances, constituted due application for and allowance of the appeal.

Respectfully submitted,

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DOW & SYMMERS,
Of Counsel.

Dated: New York, December 7, 1944.

SUPREME COURT OF THE UNITED STATES.

No. 180.—October Term, 1944.

Georgia Hardwood Lumber Company, Petitioner, *vs.* Compania De Navegacion Transmar, S. A., Owner of SS. Kotor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an admiralty case here on certiorari from the Circuit Court of Appeals for the Fifth Circuit. A single question is presented. Petitioner claims that the appeal from the District Court to the Circuit Court of Appeals was not properly taken. Since the Rules of Civil Procedure do not apply to proceedings in admiralty,[1] the question is whether the requirements of § 8(c) of the Act of February 13, 1925, 43 Stat. 936, 940, 28 U. S. C. § 230, were met. That section provides:

"No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

A final decree dismissing the libel was entered on April 20, 1943. On July 6, 1943, the libellant issued a notice of appeal, served it on respondent's proctors and obtained their acceptance. It filed the notice of appeal in the office of the clerk of the District Court on July 12, 1943. Nothing else was done within the three months' period except to consult the district judge on the amount of the appeal bond. The assignment of errors and the appeal bond were filed July 21st. A formal petition for appeal was filed on August 12th and allowed the 13th. On August 30th the district judge entered an order which treated the notice of appeal filed July 12th as an application for allowance of the appeal and granted it. That order recited that the libellant had assumed that the clerk would

[1] Rule 81(a)(1).

present the notice of appeal to the judge for an allowance, that the judge knew within the three months' period of libellant's intention to appeal and would have granted it if he had been so requested, though he assumed a formal allowance was not necessary. The Circuit Court of Appeals held that the notice of appeal filed July 12th was sufficient as an application for an appeal and that the failure to allow it within the three months' period was not fatal. 141 F. 2d 652.

We agree with the Circuit Court of Appeals. Application for an allowance of the appeal was, of course necessary. *Alaska Packers Ass'n* v. *Pillsbury*, 301 U. S. 174; *Wells* v. *United States*, 318 U. S. 257, 260. But the law does not prescribe the form in which an application for allowance of an appeal must be cast. We cannot say that the trial judge abused his discretion in treating the notice of appeal as an application for an allowance. It was properly filed with the clerk of the District Court.[2] *Steffler* v. *United States*, 319 U. S. 38, 40. The intention to appeal was apparent. Only a formal request was lacking. In other instances, where the scope of review was not affected, comparable irregularities in perfecting an appeal have been disregarded in the interests of justice. *Taylor* v. *Voss*, 271 U. S. 176, 182, and cases cited. We do not suggest that the mere filing of a notice of appeal must be taken as adequate. Desirable practice indicates that explicit instead of implied application for an allowance should be made in order to avoid litigation. We hold, however, that there is discretion to treat the notice of appeal as such an application.

Alaska Packers Ass'n v. *Pillsbury*, *supra*, does not require a different result. In that case an appeal was sought to be perfected simply by filing a notice of appeal. But it did not appear that an appeal was ever allowed. The Court held that an appeal must be applied for and allowed. It stressed the importance of the allowance in screening out improper or premature appeals and in making certain that security for costs was pro-

[2] We therefore have a different question from that presented in Reconstruction Finance Corp. v. Prudence Group, 311 U. S. 579, 582, where a notice of appeal was filed in the District Court but the appeal had to be allowed by the Circuit Court of Appeals.

Here the appeal could be allowed either by the trial judge or by a judge of the Circuit Court of Appeals. Alaska Packers Ass'n v. Pillsbury, *supra*; McCrone v. United States, 307 U. S. 61, 65; The Tietjen & Lang No. 2, 143 F. 2d 711, 712; Judicial Code, § 132, 28 U. S. C. § 228.

vided in appropriate cases. 301 U. S. p. 177. We adhere to that decision. Under this statute an allowance of an appeal is essential. *McCrone* v. *United States*, 307 U. S. 61. We only point out that the *Alaska Packers* case did not involve the question presented here, i. e., whether a notice of appeal may suffice as an application for an allowance. Nor did it involve the further question whether the allowance must be made within the three months' period. We held in *Reconstruction Finance Corp.* v. *Prudence Group*, 311 U. S. 579, that a requirement of the Bankruptcy Act that certain appeals "be taken to and allowed by the circuit court of appeals" within a prescribed time was satisfied where the application was timely but the allowance of the appeal came later. Otherwise "the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control." 311 U. S. at 582. That result is even more plainly indicated under the present statute. *The Tietjen & Lang No. 2*, 143 F. 2d. 711. For where, as here, a statute merely requires that an application for an appeal be made within a prescribed time, the allowance may be granted subsequently. *Cardona* v. *Quinones*, 240 U. S. 83.

Affirmed.